

SECURITIES AND FIDUCIARY DUTY CASES IN TEXAS

JANUARY – MARCH 2025

This quarterly newsletter summarizes recent federal and state court decisions and other developments of interest to practitioners litigating securities and fiduciary duty claims in Texas. Court rulings, hyperlinked to Westlaw, and other notable events include:

- [Fifth Circuit Rulings](#) – In a short, per curiam ruling, *United States v. Clark*, the Fifth Circuit rejected constitutional vagueness, separation of powers, and nondelegation challenges to certain provisions of the Commodities Exchange Act.
- [Federal District Court Rulings](#) – In *Gambrill v. CS DISCO, Inc.*, the district court denied in part and granted in part without prejudice a motion to dismiss a class action alleging the company and its officers overstated revenue projections and failed to disclose sexual harassment allegations. In *Schneider v. Natera, Inc.*, the district court certified a securities class action alleging false and misleading statements about the accuracy of a pre-natal test and the company's growth prospects. In *SEC v. Stanford Int'l Bank Ltd.*, the district court issued final judgments against Alan Stanford and others with eye-popping disgorgement and penalty amounts. In *Edwards v. First Trust Portfolios, LP.*, the district court denied the company's motion for summary judgment on whistleblower retaliation claims.
- [State Court Rulings](#) – In *Bertucci v. Watkins*, the Texas Supreme Court sidestepped the question whether a limited partner could be liable as a general partner if he acted as such but ruled the facts in that case did not support such a claim. In addition to various rulings regarding removal jurisdiction, the Texas Business Court issued a number of substantive decisions, including *Primexx Energy* (addressing fiduciary duty claims against a controlling partner) and *C Ten* (addressing the court's jurisdiction over injunctive and declaratory relief cases and the burden-shifting framework for amount-in-controversy pleadings). In *Eichner v. Ocwen Finan. Corp.*, the Dallas Court of Appeals confirmed that plaintiff's claims of fraudulent and inducement and breach of contract raised a non-disparagement dispute that was exempt from dismissal under the Texas Citizens Participation Act.

CASE SUMMARIES

I. FEDERAL CASES

A. [Fifth Circuit](#)

1. *United States v. Clark*, 2025 WL 801358 (5th Cir. Mar. 13, 2025)

The Fifth Circuit rejected various constitutional arguments and affirmed the conviction of Matthew Clark for conspiracy to commit honest services fraud, honest services fraud, prohibited commodities transactions, and insider trading. Clark argued that certain statutes were

Fletcher Held Quarterly Newsletter (1Q25)

unconstitutionally vague and that Congress violated the separation of powers doctrine when it delegated authority to the CFTC to promulgate rules with criminal penalties. The Court in a short, per curiam opinion rejected all of Clark's arguments.

Clark pleaded guilty to nine counts arising from two unlawful schemes he perpetrated against his employer (Company B) from 2010-19. First, Clark steered his company's trading business to a brokerage firm (Classic Energy) and received \$5.5 million in illegal kickbacks from the brokerage firm. Second, Clark shared his company's trading strategies with the same brokerage firm which then shared that information with counterparties who profited from Company B's confidential trading information. Clark received more than \$2.1 million in profits from this scheme from the counterparties.

Clark was indicted in the Southern District of Texas and filed a pre-trial motion to dismiss all charges on constitutional vagueness grounds. The district court denied the motion, and Clark pleaded guilty to three counts of the indictment but reserved his right to appeal the denial of his motion to dismiss. The district court sentenced Clark to 78 months in prison followed by three years of supervised release, and it ordered Clark to pay \$7.7 million in restitution and forfeit \$6.5 million.

Clark's lead argument was that his convictions for honest services fraud and conspiracy to commit honest services fraud were invalid because 18 U.S.C. § 1346 is unconstitutionally vague. The same argument was presented and rejected in *Skilling v. United States*, 561 U.S. 358 (2010), which chose to "construe, not condemn" the honest services fraud statute and applied a "limiting construction." *Id.* at *2. While noting that some recent Supreme Court opinions expressed doubt about the law's constitutionality, *Skilling* remains the law on § 1346. According to the opinion, the Fifth Circuit "is not in the business of overturning Supreme Court precedent." *Id.*

Clark also raised void for vagueness challenges to provisions in the Commodity Exchange Act (CEA). He claimed the terms "fictitious sale" and "not a true and bona fide price" were vague, but the Court disagreed based on the ordinary meaning of the terms. *Id.* at *3 (quoting Black's Legal Dictionary). Clark also challenged as vague the phrase "manipulative or deceptive device or contrivance" in the CEA. The Court explained that this language was borrowed from Section 10b-5 of the Securities Exchange Act and has been repeatedly quoted by the Supreme Court in opinions prohibiting trading on material, nonpublic information. *Id.*

Finally, Clark argued that Congress violated the separation of powers and nondelegation doctrines when it attached criminal penalties to the violations of CFTC regulations without providing the CFTC with an intelligible principle to guide its rulemaking. Citing *Loving v. United States*, 517 U.S. 748, 768 (1996), the Court noted that Congress could delegate such authority if it makes the violations of regulation a criminal offense and fixes the penalty. Moreover, since the Supreme Court has already issued an authoritative interpretation of the "manipulative or deceptive device or contrivance" language, the Court presumed that the intelligible principle from Congress was "to prevent commodities traders from using confidential information for their own personal advantage. That is sufficient under the Court's current 'intelligible principle' standard." *Id.* at *4.

This Fifth Circuit decision will not be included in the Federal Reporter, but it is notable for what it does not do. Unlike prior Fifth Circuit decisions that take a limited view of the federal government's power and authority to enforce the securities laws, this opinion summarily dismisses constitutional challenges to those powers. The principal reason is that the defendant challenged well-

Fletcher Held Quarterly Newsletter (1Q25)

settled precedents and terms, but it provides a useful reminder that the conservative Court generally upholds government enforcement actions against bad actors.

B. District Courts

1. *Gambrill v. CS DISCO, Inc.*, 2025 WL 388828 (W.D. Tex. Jan. 30, 2025)

Judge Ezra denied in part and granted in part without prejudice a motion to dismiss the securities class action complaint against CS Disco and two of its officers, CEO Kiwi Camara and CFO Michael LaFair. Disco provides e-discovery services to law firms and other clients, using machine learning to review documents. Disco completed an initial public offering (IPO) of 7.5 million shares in July 2021 and a second public offering (SPO) of more than 6 million shares in September 2021. The complaint alleges that Disco and its officers failed to disclose (1) that its rapid revenue growth was attributable to a small number of large clients and that this growth came to an end in the second quarter of 2022, resulting in a \$17 million decline in its 2022 projections; and (2) that CEO Camara was under investigation for a pattern of harassment and misconduct leading to his resignation from the company on September 11, 2023. The complaint supported its allegations with statements from three former employees and a Wall Street Journal article reporting on the investigation and Camara's resignation.

Vulnerability of Revenues

Plaintiffs alleged three groups of misstatements/omissions: (1) generalized statements about revenue growth in its corporate filings that failed to disclose the vulnerability of its revenues; (2) statements on earnings calls about growing product usage and customer maturity; and (3) specific statements on earnings calls about revenue projections. The Court dismissed the first group of statements for failure to allege falsity given that numerous risk factors in Disco's filings warned about the potential volatility of its revenues. The Court denied the motion to dismiss the second group of statements, stating:

Plaintiffs have sufficiently alleged that while Camara's statements in these calls regarding 'growth drivers' may be true insofar as 'legal department budgets are steady over time,' Camara's statements could be misleading if there is evidence that Disco's real revenue drivers were in fact only a handful of large Review projects. In such case, Camara's statements suggesting that any fluctuations in specific customer usage would 'washout in the aggregate' could be false and misleading.

Id. at *8. It further ruled that plaintiffs sufficiently alleged that Camara, at a minimum, acted with severe recklessness in making the statements. *Id.* at *14. Finally, the Court dismissed allegations about Disco's projections because they were forward-looking and accompanied by meaningful cautionary language. The Court also dismissed claims regarding statements that the Court found were inactionable generalized, positive statements about Disco's future prospects. *Id.* at *11.

Harassment Allegations

Plaintiffs also alleged that Disco's Code of Conduct and Business Ethics prohibited unlawful harassment or discrimination, but Camara's pattern of conduct was tolerated and concealed. They

Fletcher Held Quarterly Newsletter (1Q25)

argued that allegations reported in the Wall Street Journal were sufficiently reliable to be accepted as true in PSLRA cases. The Court noted that although the Journal article provided some details about the alleged harassment, it did not provide “corroborative sources, sufficient detail about the sources, or any indication that it is based on independent investigative efforts.” *Id.* at *13. This contrasted with a Pennsylvania case, *In re Mylan N.V. Sec. Litig.*, 2023 WL 3539371 (W.D. Pa. May 18, 2023) that provided corroborating information, and many district courts routinely reject similar claims based on unsubstantiated, anonymous sources. *Id.*

2. ***Schneider v. Natera, Inc.*, 2025 WL 369423 (Jan. 28, 2025) (magistrate judge recommendation); 2025 WL 880256 (W.D. Tex. Mar. 21, 2025) (district court order adopting recommendation)**

Magistrate Judge Howell recommended certification of a securities class action against Natera, Inc. and its executives. Natera is a diagnostics company offering genetic testing related to women’s health, oncology, and organ health. One of its primary products is Panorama, a non-invasive prenatal test that screens for fetal chromosomal abnormalities. Plaintiffs alleged that defendants made false or misleading statements about Panorama’s accuracy and Natera’s growth while relying upon deceptive sales and billing practices that inflated Natera’s revenue, including automatically opting-in patients to order testing.

Defendants argued that class certification should be denied because Plaintiffs, who purchased their stock in 2021, purchased their stock after the truth had already been revealed, which defeats both reliance for their 10b-5 claims and standing to raise Section 11 claims. Plaintiffs argued the misrepresentations began on February 26, 2020 and the truth was first revealed in a report from Hindenburg Research dated March 9, 2022. Defendants countered that the information contained in the Hindenburg report was known to the market as early as July 1, 2020 and/or December 14, 2020 when *The Capitol Forum* (TCF) published its own reports regarding Natera’s practices. Defendants further argued that the truth about Natera using opt-out forms for patients was known to the market earlier because they were publicly available on Natera’s website as early as 2020.

The Court initially appeared to rule that the “truth-on-the-market” defense, which the defendants characterized as a failure to demonstrate trade-timing, should not be considered at the class certification stage but rather should be addressed at summary judgment. *Id.* at *8 (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 260-61 (N.D. Tex. 2015) (a veiled attempt to assert a truth-on-the-market defense was not properly before the court at the class certification stage) and *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013) (proof rebutting the presumption of reliance is a matter for trial or summary judgment)). However, the Court also recognized that defendants could rebut the *Basic* presumption by showing it is more likely than not there was no front-end or back-end price impact. *Id.* Ultimately, the Court was not convinced that no front-end price impact occurred. “Confronted with limited evidence other than conflicting expert testimony on whether front-end price impact occurred, the undersigned concludes that on balance, Defendants have not carried their burden to rebut the *Basic* presumption of front-end price impact.” *Id.*

In connection with the Securities Act claims, the Court went further, stating: “As in *Oklahoma Firefighters*, the TCF disclosure in this case is likely partial. The TCF articles are not only third-party disclosures . . . but also debatably accessible.” *Id.* at *10 (noting that a TCF subscription costs \$24,000 annually). “Given that Plaintiffs have demonstrated that the TCF disclosures may not be ‘full’ as that

Fletcher Held Quarterly Newsletter (1Q25)

term is used in *Oklahoma Firefighters*, and given the Supreme Court's guidance that issues of trade timing are more properly 'a matter for trial,' the undersigned finds that Plaintiffs do not lack standing on the grounds that they fail to show that they purchased stock before any curative disclosures. *Id.* at *11 (citations omitted). The Magistrate Judge recommended granting class certification.

After considering objections from the defendant underwriters, Judge Ezra adopted the magistrate judge's recommendation and certified the class. The underwriters complained that the plaintiffs had not adequately alleged or proved that their shares were purchased directly from the underwriter defendants – a necessary predicate for claims under Section 12(a)(2) per *Gustafson v. Alloyd Co.*, 513 U.S. 561, 578 (1995)). The Court reviewed the allegations and evidence *de novo* and concluded that plaintiffs had adequately alleged and presented sufficient evidence for this stage of the proceedings to show that Key West, one of the named plaintiffs, purchased shares directly from Morgan Stanley in the SPO. The Court left open the possibility for all the underwriter defendants to submit evidence at a later stage showing that plaintiffs did not purchase any shares from them.

3. *SEC v. Stanford Int'l Bank Ltd.*, 2025 WL 332557 (N.D. Tex. Jan. 29, 2025)

Judge Godbey entered final judgments in the SEC's long-running litigation against various Stanford Financial Group entities, Allen Stanford, and other individuals. All defendants except Allen Stanford, Stanford Group Company, and Stanford International Bank consented to entry of the judgments. The eye-popping disgorgement and penalty amounts include:

- Allen Stanford: \$5.9 billion in disgorgement plus prejudgment interest jointly and severally with Stanford Group Company and Stanford International Bank; a civil penalty of \$5.9 billion; and a permanent injunction against violations of Section 10(b) of the Exchange Act, Section 17(a) of the Securities Act, Sections 206(1) and 206(2) of the Advisers Act;
- Stanford Group Company and Stanford International Bank: \$5.9 billion in disgorgement plus prejudgment interest jointly and severally with Allen Stanford, as well as a permanent injunction against violations of Section 10(b) of the Exchange Act, Section 17(a) of the Securities Act, Sections 206(1) and 206(2) of the Advisers Act, and Section 7(d) of the Investment Company Act;
- Stanford Financial Group Company: \$1.4 billion in disgorgement plus prejudgment interest;
- Stanford Capital Management: \$15 million in disgorgement plus prejudgment interest, as well as a permanent injunction against violating Section 10(b) of the Exchange Act or Section 17(a) of the Securities Act;
- James Davis: \$11 million in disgorgement plus prejudgment interest and a \$5 million penalty,¹ as well as a permanent injunction against violations of Section 10(b) of the Exchange Act, Section 17(a) of the Securities Act, Sections 206(1) and 206(2) of the Advisers Act; and

¹ Davis received an offset of \$841,000 for amounts obtained by the Receiver when his assets were seized and liquidated.

Fletcher Held Quarterly Newsletter (1Q25)

- Gilberto Lopez: \$2.3 million in disgorgement plus prejudgment interest and a permanent injunction against violations of Section 10(b) of the Exchange Act, Section 17(a) of the Securities Act, and Sections 206(1) and 206(2) of the Advisers Act.

The judgment recites that the disgorgement and penalty amounts against the entities “will be deemed satisfied upon the Court-appointed Receiver’s ultimate collection efforts and distribution to investors.” It also notes that the SEC filed a motion to deem Stanford’s obligation to pay disgorgement and interest satisfied by the forfeiture order in his criminal case, but it is unclear whether that motion was granted. The final order recites that a Fair Fund will be created for any disgorgement, interest, and penalties paid by Stanford and Davis with distribution to harmed investors by the Court-appointed Receiver.

4. *Edwards v. First Trust Portfolios L.P.*, 2025 WL 256993 (N.D. Tex. Jan. 21, 2025)

Aaron Edwards filed a whistleblower retaliation claim under SOX and Dodd-Frank after he was terminated by First Trust, a registered broker-dealer. Edwards had been cited for two compliance violations the prior year and was cited for a third on May 3, 2022 when he sent a \$62 gift to a client. Two days later, his supervisor sent an email to the firm’s president stating that Edwards was a “compliance issue” and that he would “like to get rid of [him].” On May 13, 2022, Edwards sent an email to First Trust’s compliance officer expressing concern that the firm’s year-end gift policy only authorized client gifts for the top producers at the firm and could be “(mis)construed” as an impermissible sales contest that violated SEC and FINRA rules. On May 20, 2022, three days before he was terminated, Edwards complained about the year-end gift policy again in an email to his direct supervisor. The firm then drafted a third written warning to Edwards and terminated him on May 23, 2022.

After his termination, Edwards filed a wrongful termination complaint with the Department of Labor,² but he later filed his complaint in Court under SOX’s “kick out” provision. A SOX retaliation claim requires an employee to prove “by a preponderance of the evidence, that (1) he engaged in protected whistleblowing activity, (2) the employer knew that he engaged in the protected activity, (3) he suffered an ‘adverse action,’ and (4) the protected activity was a ‘contributing factor’ in the ‘adverse action.’ ” *Id.* at *5 (quoting *Wallace v. Andeavor Corp.*, 916 F.3d 423, 426 (5th Cir. 2019) (quoting *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 259 (5th Cir. 2014); cleaned up)).

First Trust moved for summary judgment on the SOX retaliation claim arguing that (1) Edwards lacked a subjectively reasonable or objectively reasonable belief that the year-end gift policy was an illegal sales contest; (2) the firm was unaware that Edwards had filed a complaint or otherwise engaged in protected activity before he was terminated; (3) the protected activity was not a contributing factor to the termination decision; and (4) the firm would have terminated Edwards in the absence of the protected behavior.

² First Trust sought to introduce the OSHA report of investigation into Edwards’ claims as part of its summary judgment evidence, and Edwards objected. While the “kick out” statute provides for *de novo* review that “prevents deference to OSHA’s findings and conclusions if the employee subsequently sues, [] it is not a complete redaction of the administrative proceeding.” *Id.* at *5 (quoting *Wallace v. Tesoro Corp.*, 796 F.3d 468, 475 (5th Cir. 2015)). The objection was overruled.

Fletcher Held Quarterly Newsletter (1Q25)

Magistrate Judge David Horan denied First Trust’s motion for summary judgment. First, Edwards’ testified that he had a subjective belief the sales contest was illegal and explained his email saying it could be “(mis)construed” as an effort to make it less accusatory. A reasonable jury could find his belief was subjectively reasonable based on this testimony and objectively reasonable based on Edwards’ experience and his testimony about a conversation he had with the firm’s VP for National Accounts who allegedly agreed with Edwards. Second, the May 13 and May 20 internal emails suggested that First Trust was aware of Edwards’ complaints. Third, the temporal proximity between the complaints and Edwards’ termination, plus the possibility that the firm was only going to issue him a warning suggested the protected activity was a contributing factor in his termination. Finally, there was a fact dispute over whether the firm was going to terminate Edwards or simply give him a written warning.

The Court also considered Edwards’ retaliation claim under Dodd-Frank. The Court noted that no Texas district court had yet articulated the elements of a prima facie case, but the Court adopted a well-established framework for deciding retaliation in other contexts. Specifically, the Court ruled that a retaliation claim under Dodd-Frank requires a plaintiff to show that “(1) he engaged in protected activity; (2) he suffered a materially adverse employment action; and (3) there was a causal connection between the adverse employment action and the protected activity.” *Id.* at *11 (citing *Slawin v. Bank of Am. Merch. Servs.*, 491 F.Supp.3d 1334 (N.D. Ga. 2020)). For the same reasons as the SOX retaliation claim, the Court denied First Trust’s motion for summary judgment on the Dodd-Frank claim.

5. *Oaks v. Maraboyina*, 2025 WL 418743 (N.D. Tex. Feb. 6, 2025)

In this litigation between a movie producer and two investors who claimed they were defrauded, Judge Starr dismissed the investors’ claims for violations of the Texas Securities Act, negligent misrepresentation, and unjust enrichment.³ The colorful opinion includes references to “The Wolf of Wall Street” characters Jordan Belfort and Donnie Azoff but ultimately concludes that the complaint fails to plead fraud with sufficient particularity under Rule 9(b) and relies heavily on after-the-fact admissions that could not have influenced plaintiffs’ earlier investment decisions. For the one timely allegation in the complaint, the plaintiffs failed to sufficiently describe the solicitation at issue. The negligent misrepresentation claim was dismissed for similar reasons. Finally, the Court aptly noted that unjust enrichment is not an independent cause of action, it is “a theory upon which an action for restitution may rest” if other claims are adequately alleged.

6. *SEC v. Arcturus Corp.*, 2025 WL 333787 (N.D. Tex. Jan. 28, 2025)

Judge Kinkeade entered a final judgment against Alex Parvizian, Arcturus Corporation, and Aschere Energy LLC (the “Parvizian Defendants”) on SEC claims that they sold unregistered securities through unregistered brokers and made false, fraudulent, and material misrepresentations and omissions in their efforts to raise money from investors for six oil and gas wells. According to the agreed partial judgment previously entered in the case, the defendants raised almost \$22 million from 339 investors nationwide. The offerings were labelled as “joint ventures” to avoid federal securities regulations, but the investors were not active participants and had no actual control. Among other

³ All claims against the defendant production company (MarCap) were dismissed for lack of standing because the company was formed in 2023 and all the alleged misrepresentations occurred before that date.

Fletcher Held Quarterly Newsletter (1Q25)

things, the Parvizian defendants failed to disclose to investors: (1) then-current litigation that would materially affect the offerings or the entities involved; (2) significant mark-up of well costs for four of the offerings; (3) their misuse of funds for non-venture related purposes, including payment of personal expenses; (4) that the working interest in one well had already been terminated; and (5) that investors would be asked for completion funds on certain wells even before drilling had begun.

Based on these facts deemed true for the purpose of setting remedies, the Court ordered the defendants to disgorge \$9,844,127 as the total of their ill-gotten profits from the illegal offerings and fraudulent scheme. The amount was based on the declaration of an SEC Senior Accountant who reviewed the Parvizian defendants' own bank and financial records. The Parvizian Defendants argued the disgorgement amount was unreasonable but they failed to produce any evidence of legitimate business expenses. Nor did they cite any authority for their suggestion that a detailed accounting was required, and the Court ruled that it was not. The Court also rejected the defendants' facile argument that because defendants suffered a "net loss" in their business operations, there was no unjust enrichment or overall profit attributable to them. It also rejected the argument that disgorgement should be reduced because of the defendants' inability to pay.

Notably, the Court also distinguished the remedy of legal disgorgement awarded by the Court in this case from the equitable remedy of disgorgement addressed in *Liu v. SEC*, 591 U.S. 71 (2020). Citing the Fifth Circuit's ruling in *SEC v. Hallam*, 42 F.4th 316, 327 (5th Cir. 2022), that discussed a 2021 amendment to the securities laws, the Court noted that the amendment vests federal courts with jurisdiction to require disgorgement, that this "legal" disgorgement is separate from the equitable relief permitted in *Liu*, and that the amended provision applied to any cases pending when the statute was enacted in 2021. While the "legal disgorgement" is distinct from the limitations imposed in *Liu*, courts still follow the same burden-shifting framework outlined in *Liu*: First, the SEC has the burden to approximate reasonably the defendants' unjust enrichment attributable to the securities violation which may include interest but not income earned on ill-gotten profits. If the SEC meets its burden, then the defendant has the burden to prove the amount requested is "unreasonable." This is what the Parvizian defendants failed to do.

In addition to disgorgement, the Court awarded prejudgment interest and imposed a third-tier penalty of \$500,000 on the defendants. The Court noted that a third-tier penalty was appropriate when the securities violation involves fraud and a significant risk of substantial losses. The Court considered the following factors: (1) the egregiousness of the defendants' conduct; (2) the degree of scienter; (3) whether the conduct created substantial losses or the risk of them; (4) whether the conduct was isolated or recurrent; and (5) the cooperation of the defendant with law enforcement authorities. *Id.* at *7 (citing *SEC v. Offill*, 2012 WL 1138622, at *3 (N.D. Tex. Apr. 5, 2012)).

7. SEC v. McMillan, 2025 WL 531776 (N.D. Tex. Feb. 18, 2025)

Judge Pittman denied the Defendant's motion to dismiss the SEC's action for insider trading. The Defendant, Bryan Scott McMillan, was sued under Section 10(b) of the Exchange Act and Rule 10b-5 for using insider information obtained from his girlfriend to place a profitable securities trade on Apollo Endosurgery, Inc. stock. McMillan argued (1) the SEC's prosecuting attorneys are inferior officers who were not properly appointed in violation of the Appointments Clause; (2) the same attorneys violated the Take Care Clause because they are inferior officers unconstitutionally insulated from removal by the President; and (3) the SEC failed to state a claim under FRCP Rules 8 and 9.

Fletcher Held Quarterly Newsletter (1Q25)

The Court first address McMillan’s two constitutional arguments premised on the notion that the SEC’s prosecuting attorneys were “inferior officers.” In *Buckley v. Valeo*, 424 U.S. 1 (1976), to determine whether a government official is an “inferior officer” subject to the Appointments Clause, the Supreme Court focused on the extent a position wields administrative power in carrying out its assigned functions. In *Lucia v. SEC*, 585 U.S. 237, 241 (2018), the high court held that an SEC Administrative Law Judge was an officer under the Appointments Clause because the ALJ “exercises authority ‘comparable to’ that of a federal district judge conducting a bench trial.” *Id.* at 242. McMillan argued that (1) the SEC prosecuting attorney’s functions were strikingly similar to those discharged by an SEC ALJ; and (2) other courts have deemed special prosecutors to be inferior officers.

The Court rejected these arguments. First, while an SEC ALJ can “enforce compliance with discovery,” a prosecuting attorney cannot bring a lawsuit without SEC Commission approval. SEC attorneys’ investigative activities, without enforcement power, constitute the work of employees not officers. *See Buckley*, 424 U.S. at 137-38 (noting that investigative and informative power is not the same as the substantial power to enforce). Second, SEC prosecuting attorneys are distinguishable from U.S. Attorneys and special prosecutors who have the power to bring charges independently; SEC attorneys cannot initiate their own investigations and may only investigate matters and file cases when authorized by the Commission. Finally, multiple courts have ruled that the power to issue subpoenas and complete other investigative tasks under the direction of a supervisor is insufficient to qualify as an officer under the Appointments Clause or the Take Care Clause. *McMillan*, 2025 WL 531776, at *4 (cases omitted).

The Court also rejected McMillan’s argument under FRCP 8 and 9, noting that it had reviewed the briefing and the applicable law and “finds that the SEC has sufficiently pled its claim against McMillan.” *Id.*

II. STATE CASES

A. Texas Supreme Court and Business Court Cases

1. *Bertucci v. Watkins*, __ S.W.3d __, 2025 WL 807355 (Tex. Mar. 14, 2025)

The Texas Supreme Court reviewed a summary judgment ruling involving two business partners in low-income housing projects. For each project, the partners formed a separate “partnership” with a corporation as the general partner and each of them as limited partners. When a dispute broke out, one limited partner alleged that the other owed him fiduciary duties because he took a more active role in the projects and exerted operating and management control as if he were the general partner. Acknowledging that some lower Texas courts have upheld such claims for breach of fiduciary duties between limited partners, the Supreme Court refused to decide the legal issue. Instead, the Court ruled that the plaintiff in this action failed to submit sufficient evidence to support summary judgment even assuming the validity of the claim.

Factual and Procedural Background

Bertucci and Watkins were business partners in low-income housing projects. Bertucci funded the projects for a 60% interest, and Watkins managed them day-to-day for a 40% interest. Each project was structured as a separate legal partnership with a corporation as the general partner and Bertucci and Watkins as limited partners. Despite legally separating the projects (the “B-W entities”), Bertucci

Fletcher Held Quarterly Newsletter (1Q25)

and Watkins used one bank account for all the projects. The same bank account (owned by Watkins and his wife) was also used for other Watkins-only projects. When Bertucci's health declined, his son was given a power of attorney over his father's affairs. The son became concerned that Watkins had not properly managed or distributed the B-W entities' funds and demanded an accounting from the bank account. When Watkins refused, the son removed Watkins from the B-W entities and began to sell the remaining projects. This generated approximately \$4.5 million which was the subject of the parties dispute in the probate court.

Watkins requested that the funds be divided 60%-40% in accordance with their respective ownership interests. Bertucci's son (representing his father's estate) alleged individual and derivative claims against Watkins for breach of fiduciary duties, breach of contract, and violation of the Texas Theft Liability Act. The parties filed cross-motions for summary judgment, and the probate court granted summary judgment to Watkins. The Austin Court of Appeals upheld the summary judgment on the derivative claims (which it said were not properly briefed by Bertucci), but it reversed the summary judgment on the individual claims because some evidence showed that Watkins "exert[ed] operating control over the affairs of the limited partnership[s]" to such an extent that he may have owed fiduciary duties to Bertucci. The Supreme Court granted both parties' petitions for review.

Fiduciary Duties

The Court first addressed the Austin Court of Appeals' procedural ruling that Bertucci waived his derivative claims by not raising them in his opening brief. The Court noted that Bertucci's opening brief clearly alleged and argued that Watkins owed fiduciary duties to the B-W entities. The failure to list the B-W entities on the cover page or the Identification of the Parties section of the brief "was, at most, a minor and technical defect." *Id.* at *5. It remanded to the Court of Appeals to consider arguments on the derivative claims and the alleged harm caused to the B-W entities by Watkins.

The Court then addressed whether Watkins owed Bertucci a fiduciary duty individually. Under Texas law, *general* partners of a partnership owe each other duties of loyalty and care, but *limited* partners usually do not. *Id.* at *5 (citing Tex. Bus. Orgs. Code §§ 152.204 & 153.003(c)). Some courts have ruled that when a limited partner acts as a general partner and takes part in the daily operations of the business, it may owe fiduciary duties to other limited partners. *Id.* at *6 (citing *Strebel v. Wimberly*, 371 S.W.3d 267, (Tex. App. – Houston [1st Dist.] 2012, pet. denied)). The Supreme Court did not decide whether this was correct but ruled that Bertucci failed to submit facts to support the argument that Watkins owed fiduciary duties to Bertucci individually. Notably, Watkins never served as a managing partner or adopted a managing role over the companies' finances. Merely describing himself as a "managing" or "operational" partner was not enough legally for Watkins to assume the role of managing partner. *Id.* at *8.

Other Issues

The Court separately affirmed the Court of Appeals' ruling that fact issues precluded summary judgment for Watkins on limitations grounds. Watkins argued that Bertucci knew or should have known of any potential claims against Watkins because Bertucci was the sole investor and an officer of the B-W entities. Acknowledging this argument, the Court nevertheless ruled there was still a fact issue that precluded summary judgment on limitations because Watkins had agreed to handle accounting for the B-W entities, had sole signature authority over the account, and refused to provide financial information about the account when requested by Bertucci's son.

Fletcher Held Quarterly Newsletter (1Q25)

The Court also reviewed two evidentiary rulings about the admissibility of an expert report and the application of the Dead Man's Rule (preventing Watkins from testifying about alleged conversations he had with Bertucci). *Id.* at *9-11. The Court affirmed the rulings of the Court of Appeals on these issues.

2. *Primexx Energy Opportunity Fund, LP v. Primexx Energy Corp.*, 2025 WL 758641 (Tex. Bus. Mar. 10, 2025)

In its first opinion to address the contractual and fiduciary duties of partners under the Texas Business Organizations Code (TBOC) and common law, the Business Court upheld parties' freedom to contract around traditional fiduciary duties of care and loyalty in a partnership agreement. While the allowable scope of contractual modifications remains to be fleshed out in future cases, this initial opinion ruled that a controlling partner who negotiated for and used a drag-along provision in a partnership agreement satisfied minimum standards under the TBOC despite challenges to the price of the deal and the time for review before being dragged along. On the other hand, the Court denied summary judgment on some of the claims, ruling that the summary judgment evidence was insufficient to show the proceeds of the sale were distributed in accordance with the waterfall in the partnership agreement and that the total sale proceeds were properly allocated between the partnership and a sidecar asset owned by the controlling partner.

Factual Background

Plaintiffs (PEOF) were minority owners in Primexx Energy Partners, Ltd., a limited partnership with operating assets in the Permian Basin. In 2016, an affiliate of The Blackstone Group (Holdco) invested funds, took a controlling interest in the partnership, and negotiated a revised partnership agreement giving it the right to "drag along" other partners if it decided in its sole discretion and sole interest to sell the partnership in an arm's length transaction after two years.

In the Spring of 2021, Callon Petroleum made an offer to purchase the partnership for \$375 million and 8.5 million Callon shares, and that offer was increased to \$440 million in cash and 9.2 million Callon shares by late June-early July. Although Callon's shares declined in value and the CEO (Doyle) of the partnership's general manager (PEC) repeatedly stated the offer was too low, Holdco decided to accept it. It informed the directors on the PEC board on July 30 and demanded a vote by August 2. The PEOF representatives on the board and others complained they were not given time to evaluate the deal, but the sale was unanimously approved on August 2 based on the "drag-along obligations" in the partnership agreement. The sale documents were completed the next day, and the sale closed on October 1, 2021.

PEOF sued Holdco (as majority owner) and PEC (as general manager) for breach of fiduciary and contractual duties and obligations by (i) accepting too low a price; (ii) failing to perform adequate due diligence, consider continuing the business as a viable stand-alone business or other alternatives, consider whether the sale was fair to the partnership and other partners; (iii) not giving timely notice of the sale; (iv) not properly distributing the sales proceeds according to the waterfall in the partnership agreement; and (v) unfairly allocating sales proceeds to a "sidecar" business of The Blackstone Group that was sold in the same transaction. PEOF also sued PEC's chief executive officer (Doyle) for conspiracy and other "derivative theory" causes of action. Defendants moved for summary judgment on all claims.

Court Analysis

This opinion is one of the first Texas Business Court decisions to address fiduciary duty claims. The Court devoted a substantial portion of the opinion to describing and characterizing provisions of the TBOC relevant to partnerships. *See* TBOC §§ 152-153. It also discussed two predecessor statutes (TUPA and TRPA) and Texas common law on partner duties. While acknowledging that the TBOC provides “a more specific and explicit statement of a partner’s duties to the partnership and other partners than existed under the common law,” *id.* at *11, and that a partnership agreement is “the baseline for determining [partners’] responsibilities to the partnership and each other,” *id.*, the Court stopped short of ruling that the TBOC displaced common law. Rather, it concluded that “the extent to which the TRPA and the TBOC replaced common law principles – and especially the disclosure duty – is unclear.” *Id.*

The Court took the following approach to analyzing fiduciary duties in the case:

First, it looked to the parties’ agreement that “governs the relations of the partners and between the partners and the partnership.” *Id.* at *13-14 (quoting TBOC §152.002(a)). In that document, the parties agreed they owed “duties of good faith and fair dealing” to the full extent required by Texas law but otherwise disclaimed any “fiduciary duties” to the “fullest extent permitted by law.” *Id.* at *14.

Second, it discussed the general standards of conduct for partners in the TBOC, describing them as follows:

- Partners owe the partnership and other partners fiduciary duties of care and loyalty that must be performed (i) in good faith and (ii) in a manner the partner reasonably believes to be in the partnership’s best interest. *Id.* (citing TBOC §152.204(a)-(b)).
- A partner is not a trustee and does not violate his duties merely because he acts to further his own interests. *Id.* at *14-15.
- Partners may not completely eliminate their responsibilities, but they may define specific conduct that does not violate them unless manifestly unreasonable. For example, they may eliminate their duty to act in the best interests of the partnership, but they may not eliminate their obligation to perform duties in good faith. *Id.* (citing TBOC § 152.002(b)).⁴
- Common law loyalty principles may supplement the “inclusive” list of loyalty duties in TBOC §152.205 if they are of the same type and consistent with the partnership agreement and other partnership statutes. *Id.* at *14. However, the duty of care

⁴ The Court states generally that partners “may define specific conduct that does not violate” their duties without differentiating between modifications to the duty of care and the duty of loyalty. *Id.* at *15 (citing TBOC §152.002(b)). The statute draws a finer distinction between the two, authorizing partners to (a) “determine the standards” for performance of the duty of care, and (b) “identify the specific types of activities or categories or activities” that do not violate the duty of loyalty. TBOC §§152.002(b)(2)-(3).

definition in TBOC §152.206 is exclusive (so, presumably, common law duty of care principles cannot supplement the statutory duty). *Id.*

Third, the Court addressed the duties of candor and mandatory disclosure. While the TBOC does not define “good faith,” the duty of candor (honesty) is part of good faith. But this does not necessarily mean partners must volunteer all material information about a partnership or other partners. *Id.* at *17 (citing TBOC §152.213 which requires partners to furnish complete and accurate information *upon request and to the extent just and reasonable*). Finding no clear guidance in the statute or prior cases, the Court adopted the following standards for when a partner must volunteer information: (1) if the partnership agreement directly or indirectly requires it; (2) if the partnership agreement is silent, but the information is material to the partnership or other partners and not ordinarily addressed in the partnership agreement (e.g., disclosing litigation filed against the partnership); or (3) if not disclosing the information would be considered a fraudulent omission.⁵ *Id.* at *18-19.

Applying these duties, principles, and standards to the claims for breach of loyalty, care, and good faith brought by PEOF against the Blackstone entities, the Court granted summary judgment to the Blackstone entities on all contractual and fiduciary duty claims relating to the decision to sell the partnership to Callon, including dragging along the other limited partners and not informing them of the sale until the end of July 2021. Pursuant to the partnership agreement, Holdco was free to negotiate the sale terms in its sole discretion and sole interest and had the negotiated right to drag along the other partners. Nothing in the partnership agreement required Holdco to give advance notice of the sale, despite such provisions being common when there are drag-along rights.

The Court denied summary judgment to the Blackstone entities on the claims alleging (1) the Callon sales proceeds were not properly distributed according to the partnership waterfall agreement, and (2) the total consideration paid by Callon was not fairly allocated between the partnership and a side-car entity owned by Blackstone entities. While the Blackstone entities presented some evidence that PEOF received money and shares, it did not submit evidence to disprove the claim that preferred shareholders were not paid according to the waterfall. The Blackstone entities did not submit any evidence on the improper allocation claim. Accordingly, the Court denied summary judgment on these two claims.

Finally, the Court granted summary judgment to the defendants on certain additional causes of action and requested additional briefing on others. Since neither the Texas Supreme Court nor the Fifteenth Court of Appeals recognizes aiding and abetting as a separate liability theory from civil conspiracy, that claim was dismissed.⁶ As for the conspiracy and knowing participation claims, the Court noted they appeared to depend on the viability of the fiduciary duty claims that were dismissed but requested additional briefing.

3. C TEN 31 LLC v. Tarbox, 2025 WL 224542 (Tex. Bus. Jan. 3, 2025)

This Texas Business Court opinion authored by Judge Melissa Andrews addresses (1) the Business Court’s jurisdiction over cases seeking injunctive or declaratory relief, and (2) the burden-

⁵ The Court noted that disclosure would not be required when (d) a partner is acting in its self interest and the partnership agreement does not require disclosure, or (e) the information is immaterial under the circumstances. *Id.* at *18-19.

⁶ The Texas Business Court views rulings by the Texas Supreme Court and the Fifteenth Court of Appeals as binding precedents, and “considers other intermediate appellate decisions for whatever persuasive value they have.” *Id.* at *9.

Fletcher Held Quarterly Newsletter (1Q25)

shifting framework for challenges to amount-in-controversy pleadings in the removal context. The case hit our radar because the underlying dispute involves alleged breaches of fiduciary duty by two managers of an LLC, but the opinion does not address the fiduciary duty claims. We nevertheless include it because it shows the conscientious effort by judges on the new Texas Business Court to lay a solid procedural framework for future cases.⁷

Factual and Procedural Background

Summer Moon Holdings, LLC owns, operates, and franchises coffee shops and is governed by a three-person Board of Managers. One manager is designated by minority owner CTen 31 LLC (CTen), and the other two are designated by majority owner Coffee Unplugged, LLC (CU). On September 16, 2024, CTen’s designated manager purported to remove CU’s managers for conflicts of interest. CTen then filed a declaratory judgment action in Travis County to confirm that this action was effective. The two managers timely removed the action to the Texas Business Court. When CU then attempted to designate replacement managers from “Trojan Horse shell entities,” CTen amended its petition and sought a declaration that CU’s actions breached its fiduciary duties. CTen also filed a motion to remand the action to Travis County district court, as well as a third amended petition. None of the petitions seeking declaratory and/or injunctive relief stated that the case met or did not meet the Court’s amount-in-controversy requirement, but CU’s notice of removal alleged that the value of rights at issue exceeded \$5 million.

Court Analysis and Rulings

The Business Court’s statutory jurisdiction to hear cases is set forth in Section 25A.004 of the Government Code which grants concurrent jurisdiction with district courts in:

- (b) business-affairs actions⁸ when the amount in controversy exceeds \$5 million;
- (c) business-affairs actions, regardless of the amount in controversy, when a party is a publicly traded company;
- (d) actions arising out of certain commercial transactions and violations of the Finance or Business & Commerce Code; and
- (e) actions seeking injunctive or declaratory relief “involving a dispute based on a claim *within the Court’s jurisdiction*” under subsection (b), (c), or (d).

Id. at *3 (emphasis added).

⁷ The Business Court has issued more than a dozen decisions in recent months. Most have addressed whether cases filed before September 1, 2024 can be removed to the Business Court – they cannot even if new claims are filed in the action or the parties agree to the Court’s jurisdiction.

⁸ The business-affairs actions listed in the statute are derivative proceedings; actions regarding an organization’s governance, governance documents, or internal affairs; actions against certain defendants asserting securities claims or involving trade regulation law; actions by an organization or its owner against the organization’s owner, controlling person, or managerial official; certain actions alleging a breach of a duty owed to an organization or its owner; actions seeking to pierce the corporate veil; and actions arising out of the Business Organizations Code. *Id.*

Fletcher Held Quarterly Newsletter (1Q25)

Defendant CU first argued the Court had jurisdiction under subsection (e) regardless of the amount in controversy because plaintiffs sought injunctive or declaratory relief and the claims fell within four categories of disputes listed in subsection (b). Plaintiff CTen responded that claims for injunctive or declaratory relief still had to meet the \$5 million amount-in-controversy minimum to be “within the Court’s jurisdiction.

The Court agreed with CTen that the \$5 million minimum amount-in-controversy requirement applied to actions for declaratory or injunctive relief. First, the plain language of the statute indicates that the phrase “within the court’s jurisdiction under subsection (b)” incorporates section (b)’s amount-in-controversy requirement. Second, if subsection (e) eliminated the amount-in-controversy requirement, there would be no need for it to list subsection (c) which eliminates the minimum amount requirement for cases involving public companies. Third, the parties agreed – and Texas cases support the notion – that amount-in-controversy minimums can be applied in declaratory and injunctive relief actions. *Id.* at *5 & *10 n.71 (quoting *Tune v. Tex. Dep’t of Pub. Safety*, 23 S.W.3d 358, 362 (Tex. 2000) (“[t]he subjective value of a privilege, if asserted in good faith, establishes jurisdiction if that value meets the requisite amount in controversy.”)).⁹

The Court then turned to a matter of first impression: what procedures should govern removal to the Business Court when the parties dispute the amount in controversy. After reviewing federal and state court approaches to the issue, the Court adopted the Texas burden-shifting approach and set forth the following rules:

- The amount-in-controversy requirement applies at the action level, rather than as a per claim minimum, *id.* at *7;¹⁰
- If a party (plaintiff in a petition, defendant in notice of removal) pleads that the amount in controversy exceeds \$5 million, the party seeking to remand has the initial burden of proof to show otherwise;
- If the initial burden is met, the burden shifts and the party resisting remand must raise a fact issue about the amount in controversy;
- If there is a fact issue about the amount in controversy, the party resisting demand has the burden of proof at trial to show the amount-in-controversy requirement is satisfied.

Applying these rules to the case, the Court ruled that CU pleaded the value of its rights were in excess of \$5 million in its notice of removal. CU asserted that Summer Moon’s value far exceeded \$5 million, and it had no obligation to file jurisdictional evidence at the pleading stage. *Id.* at *11. CTen admitted that it had no factual basis to dispute the value of Summer Moon or the value of CU’s rights

⁹ In a subsequent case, Judge Andrews repeated that injunctive relief actions not seeking damages can still satisfy jurisdictional amount-in-controversy minimums. *SafeLease Ins. Servs. LLC v. Storable, Inc.*, 2025 Tex. Bus. 6 (Tex. Bus. Feb. 10, 2025) (citing *C Ten* and other cases).

¹⁰ However, the Court was not saying the term “action” can never refer to less than all the claims in a suit. *Id.* at *9. For example, the jurisdictional statute extends supplemental jurisdiction to some claims and specifically carves out others (e.g., personal injury claims). Thus, some claims might have to be severed or dismissed for the action to proceed in the Business Court.

Fletcher Held Quarterly Newsletter (1Q25)

at issue in the case which would be complex and subject to expert analysis. Thus, the pleadings control absent evidence that the amount pleaded is fraudulent. *Id.* at *14.

Because CTen was unaware of its initial burden to prove that the amount-in-controversy requirement was not met, the Court granted CTen's request to supplement the record and gave the parties 45 days to conduct discovery on the value of the subject matter of the dispute.

Finally, the Court dispensed with CTen's argument that a venue provision in the Company Agreement provides for exclusive jurisdiction in the Travis County District Courts. Noting that CU was not party to the agreement and that CTen had not attached the agreement to its briefing, the Court held that CTen "has not shown that this action falls within the scope of the clause or that Defendants, as non-signatories, are bound by it." *Id.* at *16.

The Business Court rulings in *Primexx Energy* and *CTen* provide some evidence of how the Business Court is approaching its work. In contrast to most state district court rulings, the Business Court decisions are reasoned, lengthy, and heavily footnoted. Each analyzes the issues presented and the parties' arguments in some detail. For the benefit of the reader, but not part of the Court's opinion, each opinion includes a short syllabus drafted by Court staff summarizing the holdings in the case.

B. Other Texas State Court Cases

1. *Collins v. Hetzler*, 2025 WL 937486 (Tex. App. – Ft. Worth Mar. 27, 2025)

The Fort Worth Court of Appeals affirmed a take-nothing jury verdict on fiduciary duty claims against the founder of a company. The plaintiff argued that the terms of the founder's divorce settlement in 2013 proved that the founder breached his fiduciary duties. The jury disagreed, and the Court of Appeals affirmed because there was more than a scintilla of evidence supporting the jury's take-nothing verdict.

The plaintiff, Neil Collins, was the first employee of Contemporary Research Corporation (CRC), a company founded by defendant Robert Hetzler. Collins joined CRC in 1993 and received incentive stock that vested in 1996. In approximately 2001, with its sales lagging, Hetzler decided that CRC needed a business plan and a marketing director. He hired his college friend, defendant Marianne Zaccaro, as marketing director. The following year, she and Hetzler married. Collins left the company that same year but retained his stock in CRC.

At least six times after his departure, Collins emailed Hetzler about selling his shares or obtaining financial information about CRC. Hetzler responded to the emails but did not share any financial information with Collins. In 2014, after CRC publicly announced the formation of a subsidiary company to supply parts to CRC, Collins requested access to CRC's financial information. Hetzler refused, but Collins followed up in 2018 with a more specific demand. Hetzler finally shared information with Collins at the 2018 shareholder meeting (the first time such information was shared with shareholders in the company's 25-year history). The information led Collins to demand a pre-litigation (Rule 202) deposition. During the deposition, Collins learned additional facts about Zaccaro's post-divorce work for CRC and Hetzler and Zaccaro's divorce decree that led him to sue Hetzler for breach of fiduciary duties and to sue Zaccaro and various entities for aiding and abetting the breach and financial improprieties.

Fletcher Held Quarterly Newsletter (1Q25)

Specifically, Collins alleged that when Hetzler and Zacarro divorced, Hetzler agreed to pay Zacarro \$900,000 in exchange for a release of her claims as a shareholder of CRC. Zacarro later agreed that the payments she received for consulting work from CRC would count against Hetzler's divorce obligation, including \$300,000 in 2011, and \$200,000 in each year from 2012 to 2014. Collins argued that the divorce decree was a tri-party agreement among Hetzler, Zacarro, and CRC. He claimed that Hetzler had a conflict of interest because he used CRC's corporate funds to pay off his personal debt. Collins sued individually and as a shareholder of CRC.

The appeal focused on the jury's answer to three questions and who had the burden of proof: (1) did Hetzler profit or benefit from a transaction with CRC or place himself in a position of conflict between his self-interest and his fiduciary duties (plaintiff's burden); (2) if yes, did Hetzler demonstrate that he did not breach his fiduciary duties to CRC because the transaction was entered into in good faith and for fair consideration (defendant's burden); and (3) did Hetzler fail to comply with his fiduciary duties to CRC (plaintiff's burden)?

The Court concluded that the verdict was legally and factually sufficient. The jury could reasonably have found that CRC had no obligations under the divorce decree because it was not a party, CRC received a benefit from Zacarro's consulting services and her abandonment of claims as a shareholder, and Zacarro was free to give credit to Hetzler under the divorce decree for CRC's payments. Because there was more than a scintilla of evidence to support the jury's finding, it was legally sufficient. Because Collins failed to demonstrate that the jury's finding was contrary to the overwhelming weight of the evidence, it was also factually sufficient.

2. *Eichner v. Ocwen Finan. Corp.*, 2025 WL 642380 (Tex. App. – Dallas Feb. 27, 2025)

The Dallas Court of Appeals affirmed the trial court denial of a motion to dismiss under the Texas Citizens Participation Act (TCPA) because the plaintiff's claims of fraudulent inducement and breach of contract related to a non-disparagement dispute and were exempt from the TCPA.

In 2012, non-party attorney Samuel Boyd filed litigation on behalf of a client alleging that Plaintiff Ocwen Financial Corporation defrauded the federal government by making false certifications and statements to the government to participate and receive incentive payments under the Home Affordable Mortgage Program. Defendant Jean-Marc Eichner gave deposition testimony on behalf of Ocwen in the litigation, and the claims were ultimately resolved. Seven years later, Eichner was informed that he would be terminated because Ocwen was closing the facility where he worked. Eichner signed a separation agreement pursuant to which he was paid \$130,000 and waived all claims he had or might have had against Ocwen through the settlement date of the release. A few months later, Eichner, represented by attorney Boyd, filed a qui tam suit against Ocwen alleging the company had defrauded the government in connection with servicing borrower loans.

Ocwen sued attorney Boyd and his firm for breach of the settlement agreement in the earlier suit and for tortiously interfering with a business relationship and fraudulently inducing Ocwen to enter into the separation agreement with Eichner by planning to sue Ocwen after the termination. Ocwen sued Eichner for breach of his separation agreement, and Eichner moved to dismiss under the TCPA. The trial court conducted a hearing and orally denied the motion to dismiss from the bench but never signed an order. Eichner appealed, arguing that his motion to dismiss was overruled by operation of law 30 days after the hearing. Ocwen moved to dismiss the appeal for lack of jurisdiction.

Fletcher Held Quarterly Newsletter (1Q25)

Jurisdictional Ruling

The Court of Appeals ruled that the appeal was proper despite the absence of a written order because the TCPA contains an exception: “If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005 [30 days], the motion is considered to have been denied by operation of law and the moving party may appeal.” TEX. CIV. PRAC. & REM. CODE § 27.008(a). Although three other courts ruled that this language did not eliminate the need for a written order, the Dallas Court followed the reasoning of the Fourteenth Court of Appeals in Houston in *Simmons v. Taylor*, 651 S.W.3d 499, 503 (Tex. App. – Houston [14th Dist.] 2022, no pet.) which held that a trial court could not insulate its decision from appellate review by refusing to sign a written order and refusing to hear an appeal for that reason would not safeguard litigants’ constitutional rights.

Substantive Ruling

Turning to the denial of the motion to dismiss, the Court ruled that the non-disparagement exemption in the TCPA supported the trial court’s decision. While Eichner argued the pleadings failed to allege that anything in Eichner’s qui tam complaint was false so the non-disparagement exemption did not apply, the Court disagreed. It reasoned that Ocwen’s petition claimed that the qui tam suit disparaged the company and violated the terms of his separation agreement. Accordingly, the company “successfully demonstrated that its contract claim is exempted by the TCPA.” *Id.* at *5.

N. Scott Fletcher
Kenneth P. Held

FLETCHER | HELD

Securities and Commercial Litigation, Internal Investigations, and Enforcement Defense

808 Travis Street, Suite 1553
Houston, TX 77002

(713) 255-0422

www.fletcherheld.com

Fletcher Held, PLLC quarterly newsletters are only intended to provide general information and should not be construed as legal advice on any specific facts or circumstances. Transmission of this publication is not intended to create an attorney-client relationship. This newsletter may not be quoted or referenced in other publications or proceedings without prior written consent of the Firm. The views expressed in this newsletter are the personal views of the authors and do not necessarily reflect those of the Firm or its clients.