

SECURITIES AND FIDUCIARY DUTY CASES IN TEXAS

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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:

- Supreme Court Ruling – In the *Medical Marijuana* case, the U.S. Supreme Court held that a plaintiff is not categorically barred from seeking treble damages for business or property loss if the loss resulted from personal injury, adopting the Second Circuit’s minority view among circuit courts. The dissent criticized the majority for not deciding “whether lost wages and medical expenses (which are among the most common economic damages in personal-injury cases) qualified as business or property losses” and predicted confusion as lower courts grapple with RICO personal-injury cases and what losses qualify as business or property losses.
- Fifth Circuit Rulings – In *Ezell*, the Fifth Circuit affirmed the dismissal of derivative claims against the officers and directors of Cabot Oil & Gas. In *Vuoncino v. Forterra*, the Court reversed the dismissal of a whistleblower retaliation complaint against one of three corporate defendants because it plausibly alleged a claim against the company but ruled an amendment naming other corporate defendants was untimely. In the second appeal of an SEC receivership case, *Barton v. SEC*, the Fifth Circuit affirmed the imposition of a receivership over multiple entities that received or benefitted from assets traceable to defendant’s alleged fraudulent activities and affirmed the district court’s decision to freeze the assets of other defendant-controlled entities until additional tracing could be completed.
- Federal District Court Rulings – In securities fraud cases, federal district courts (1) dismissed a putative securities fraud class action against AT&T without prejudice, giving plaintiffs thirty days to file an amended complaint; (2) certified a class action against Concho with two subclasses of stock purchasers; and (3) granted the motion to amend a complaint against Cassava Sciences to add allegations about an indictment and SEC charges that occurred after the amendment deadline passed. In other cases, federal district courts addressed the elements for a Dodd-Frank whistleblower retaliation claim, a cryptocurrency investment scheme, judicial notice of bankruptcy pleadings, and an attempt to enjoin a FINRA arbitration.
- State Court Rulings – In *First Sabrepoint*, the Texas Supreme Court partially reversed rulings relating to a “short and distort” scheme. In *Westlake Longview*, the Texas Business Court addressed what information qualifies for “attorney’s eyes only” protection under a protective order. In other cases, Texas appellate courts addressed a partnership books and records request, and whether fiduciary duty claims are preempted in a trade-secret-misappropriation case.

CASE SUMMARIES

I. FEDERAL CASES

A. U.S. Supreme Court

1. *Medical Marijuana, Inc. v. Horn*, 145 S. Ct. 931 (2025)

In this civil RICO case, the Supreme Court resolved a circuit split and held that a plaintiff is not categorically barred from seeking treble damages for business or property loss if the loss resulted from a personal injury. Three circuits had barred such RICO claims, but the Second Circuit rejected the antecedent-personal-injury-bar rule and reversed the trial court's order of summary judgment for the defendant. Justice Barrett, who wrote the majority opinion, was joined by Justices Sotomayor, Kagan, Gorsuch, and Jackson. The ruling opens the door to future RICO claims arising from personal injuries, but the lower courts will have to determine whether things such as lost wages and medical expenses qualify as business or property damages under the Court's ruling.

Factual Background

Plaintiff Douglas Horn was a commercial truck driver who purchased "Dixie X" to relieve chronic pain. Although Dixie X was advertised as a CBD-rich product with 0% THC, Horn tested positive for THC in a random drug test by his employer. He was fired after he refused to complete a substance-abuse program. Horn then sued the defendant, Medical Marijuana, Inc., for civil RICO and a host of state law claims. He alleged the defendant was a RICO enterprise engaged in marketing and selling an illegal drug and that its misleading ads were predicate acts of mail and wire fraud that constituted a pattern of racketeering.

The trial court granted summary judgment to Medical Marijuana on the civil RICO claim, reasoning that Horn's loss of employment flowed from a personal injury he suffered, *i.e.*, the introduction of THC into his system through ingestion of Dixie X. Since a plaintiff cannot recover under civil RICO for personal injuries, the court reasoned that he could not recover for "business or property harm" that results from a personal injury.

The Second Circuit reversed. First, the ordinary meaning of "business" includes both a commercial enterprise and an individual's employment. Under this ordinary meaning, Horn was "injured in his business" when he lost his job. Second, nothing in RICO's statutory language ("injured in his business or property") excludes recovery for business or property damages that happen to derive from a personal injury. Third, the Second Circuit rejected the antecedent-personal-injury-bar rule adopted by the Sixth, Seventh, and Tenth Circuits, thus setting up a circuit split for resolution by the Supreme Court.

Majority Opinion

The majority opinion begins by stating what it was *not* deciding, namely (1) whether Horn suffered an antecedent personal injury when he consumed THC; (2) whether the Second Circuit correctly interpreted "business" to encompass "employment" for purposes of civil RICO cases; and (3) what it means for a plaintiff to be "injured in his ... property" under civil RICO. The only question before the Court was "whether civil RICO bars recovery for *all* business and property harms that derive from a personal injury." *Id.* at 938 (emphasis added).

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The majority then parsed the words of 18 U.S.C. § 1964(c). It adopted the ordinary meaning of the term “injury” and concluded that a person has been “injured in his business or property” if his business or property has been damaged. This “‘business or property’ requirement operates with respect to the *kinds* of harm for which the plaintiff can recover, not the *cause* of the harm.” *Id.* at 939. Thus, if a gas station owner is beaten in a robbery, he cannot recover for his pain and suffering but he can recover for the loss of his business if he is forced to shut his doors. “In short, a plaintiff can seek damages for business or property loss regardless of whether the loss resulted from a personal injury.” *Id.*

The majority rejected the argument by the defendant and Justice Kavanaugh’s dissent that “injury” has a specialized meaning under the RICO statute as “invasion of a legal right.” It pointed out that “injury” has both an ordinary and specialized meaning. The statutory context, including use of the non-specialized term “injured” in another section of the statute, favors the ordinary meaning of the word. It also rejected the argument that the Court’s precedents involving treble damages in antitrust cases were controlling. Unlike antitrust cases that require a particular type of injury, *i.e.*, an injury of the type antitrust laws were designed to prevent, the Court long ago held that a civil RICO plaintiff need not allege a “racketeering” or “RICO-type” injury to bring a civil RICO claim. All that is required is business or property harm resulting from the defendant’s predicate acts. *Id.* at 939-43.

In response to the dissent’s concern that future plaintiffs would convert garden-variety personal-injury claims into RICO suits for treble damages, the majority pointed to RICO’s “by reason of language” as requiring “some direct relation between the injury asserted and the injurious conduct alleged.” *Id.* at 945. It acknowledged that this “by reason of” language could pose an insurmountable obstacle in Horn’s case and that he faced a “heavy burden on remand.” *Id.* It further noted that pleading a RICO claim is not as simple as identifying a business or property harm. It requires alleging two or more predicate crimes within a single scheme that were related and amounted to, or threatened the likelihood of, continued criminal activity. *Id.* Finally, it noted that the term “business” may not encompass every aspect of an individual’s employment; thus, monetary harms such as lost wages and medical expenses might not be considered RICO damages.¹

Dissenting Opinions

Justice Thomas dissented on grounds that (1) the parties “dispute an important threshold issue: whether the plaintiff here suffered a personal injury in the first place” *id.* at 947, and (2) they have inadequately briefed their views on the meaning of the key statutory phrase “injured in his business or property.” *Id.* He would have dismissed the writ of certiorari as improvidently granted.

Justice Kavanaugh (with Chief Justice Roberts and Justice Alito joining the opinion) dissented, criticizing the majority for not deciding “whether lost wages and medical expenses (which are among the most common economic damages in personal-injury cases) qualify as business or property losses recoverable in those RICO suits.” *Id.* at 953. The dissent predicts that the majority opinion will leave “substantial confusion in its wake. The aftermath of the Court’s opinion could be quite a mess, as

¹ The Court also acknowledged that civil RICO has undeniably evolved “into something quite different from the original conception of its enactors.” *Id.* at 946 (quoting *Sedima*, 473 U.S. at 500). But it placed the onus on Congress to correct the breadth of the statute if there was an undue proliferation of RICO suits. *Id.*

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courts grapple with RICO personal-injury cases where the question is what losses qualify as business or property losses.” *Id.*

B. Fifth Circuit

1. *Ezell on Behalf of Nominal Defendant Cabot Oil & Gas Corp. v. Dinges*, ___ F.4th ___, 2025 WL 1377393 (5th Cir. May 13, 2025) (Graves, J.)

The Fifth Circuit affirmed Judge Rosenthal’s dismissal of a derivative action against the directors of Cabot Oil & Gas. The Court broadly agreed with the district court’s rulings that (1) the record (including Section 220 materials) did not support an inference of bad faith in the board’s oversight of the Company’s environmental issues; (2) the pleadings did not allege sufficient facts to suggest that a majority of the board faced a substantial likelihood of liability for corporate misrepresentations; and (3) the plaintiffs failed to establish that a majority of the board lacked the ability to evaluate insider trading allegations against one director. In addition to these substantive rulings, the Fifth Circuit formally adopted a *de novo* standard of review for appeals of shareholder derivative actions dismissed for failure to plead demand futility under FRCP 23.1.

Factual Background²

Cabot was engaged in fracking operations in Susquehanna County, Pennsylvania (Marcellus Shale). In 2009, a residential water well near Cabot’s operations exploded, and the Pennsylvania EPA concluded that methane gas from Cabot wells migrated into the water system and caused the explosion. Cabot entered into consent orders in 2009 and 2010 that required the company to remediate the damage and comply with all applicable environmental laws and regulations. Cabot failed to remediate promptly, and it received hundreds of “notices of violations” over the next decade. In 2020, a grand jury in Pennsylvania indicted the company on 15 criminal charges. The company entered a plea of *nolo contendere*.

This derivative action was filed in October 2020 without making demand on the board. Plaintiffs alleged demand was futile because a majority of the board members (1) failed to exercise proper oversight per *Caremark* and undertook little to no remediation efforts until 2018; (2) caused Cabot to issue material misrepresentations about its compliance with the consent orders; and (3) one director engaged in insider trading (a *Brophy* claim). The district court initially dismissed with leave to amend, then dismissed with prejudice.

Standard of Review

The Fifth Circuit formally adopted a *de novo* standard of review for shareholder derivative demand futility cases. *Id.* at *3. It joined the majority of other circuits and noted that the Courts of Appeals for the Ninth, Eleventh, and D.C. Circuits have expressed doubts or modified the abuse of discretion standards they employ. *Id.*

² For additional factual details and discussion of the district court decisions prior to appeal, see FH 1Q22 Newsletter, at 15-17 (dismissal without prejudice), and FH 1Q24 Newsletter, at 16-20 (dismissal with prejudice).

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Analysis

Since Cabot is incorporated in Delaware, the Court looked to Delaware law for the substantive elements of the demand requirement. *Id.* (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991)). “Unless the board of directors permits the stockholder to proceed, a stockholder only can pursue a cause of action belonging to the corporation if (i) the stockholder demanded that the directors pursue the corporate claim and they wrongfully refused to do so or (ii) demand is excused because the directors are incapable of making an impartial decision regarding the litigation.” *Id.* at *4 (quoting *United Food & Com. Workers Union v. Zuckerberg*, 250 A.3d 862, 876 (Del. Ch. 2020) (citation omitted), *aff’d*, 262 A.3d 1034 (Del. 2021)). To determine demand futility, Delaware courts ask on a director-by-director basis:

(i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that are the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Id. (quoting *Zuckerberg*, 262 A.2d at 1059)). If the answer to any of the questions is “yes” for at least half of the board members, demand is excused as futile. *Id.*

Caremark Claim – Failure of Oversight

Plaintiffs first claim was failure of oversight, *i.e.*, that the board “having implemented a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.” *Id.* at *5 (quoting *Stone ex. rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006)). For this claim, “a showing of bad faith is a necessary condition to director oversight liability.” *Id.* (quoting *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017)). Shareholders must plead facts that allow a reasonable inference that a director was both acting inconsistently with his fiduciary duties and knew he was so acting. *Id.* (quoting *Horman v. Abney*, 2017 WL 242571, at *7 (Del. Ch. Jan. 19, 2017)). Shareholders must plead particularized facts that the board knew of evidence of misconduct – the proverbial red flag – yet acted in bad faith by consciously disregarding its duty to address that misconduct. *Id.* (quoting *Reiter ex. rel. Capital One Fin. Corp. v. Fairbank*, 2016 WL 6081823, at *8 (Del. Ch. Oct. 18, 2016)).

Plaintiffs alleged the 2009 and 2010 consent orders were red flags, as well as the hundreds of notices of violation the company received. The Fifth Circuit disagreed. Pointing to documents produced in response to a Section 220 demand, the Fifth Circuit noted that the Board and its environmental compliance committee received regular updates about the consent orders, notices of violation, remediation efforts, testing results, and claims made in lawsuits. *Id.* at *6. “The facts here ‘suggest a failed effort, not one opposed to the interests of [Cabot] or otherwise in bad faith.’” *Id.* (quoting *Richardson ex. rel. MoneyGram Inst’l, Inc. v. Clark*, 2020 WL 7861335 (Del. Ch. Dec. 31, 2020)).

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Director Disclosure Liability Claim

Plaintiffs next claimed the Cabot directors violated their disclosure duties by issuing false and misleading statements in two 2019 10-Qs discussing remediation efforts at specific wells. Under *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998), a director breaches the duty of loyalty and good faith if they “knowingly disseminate to the stockholders false information about the financial condition of the company.” Communications that are deceptive or incomplete can also violate fiduciary duties, but to excuse demand, a plaintiff “must plead particularized allegations that ‘support the inference that the disclosure violation was made in bad faith, knowingly or intentionally.’” *Id.* (citations omitted).

The Court carefully reviewed the two 10-Qs, noting the language about remediation at the Howell and Jeffers Farms wells. It rejected plaintiffs’ suggestion that the phrase “performed appropriate remediation efforts” meant that the company’s work on both wells was complete and distinguished 10-Q statements about remediation of the Howell well versus the ongoing investigation and remediation of the Jeffers Farm well. *Id.* at *9.

Insider Trading Claim

Plaintiffs’ final argument, that one director engaged in insider trading, was raised in a footnote. The Court ruled that the argument was waived. It further noted that even if a single director who influenced two others breached his fiduciary duties by trading on material nonpublic information, the plaintiffs had to demonstrate that at least half the board lacked independence to show demand futility. *Id.* at *10.

2. *Vuoncino v. Forterra, Inc.*, __ F.4th __, 2025 WL 1564344 (5th Cir. June 3, 2025) (per curiam)

When the Fifth Circuit closes a door, sometimes it opens a window. In a per curiam opinion, the Court affirmed the denial of leave to amend a complaint but then ruled the complaint plausibly alleged a claim the district court had dismissed. The principal issues in this SOX retaliation claim were (1) who employed the plaintiff and (2) whether plaintiff’s claim against that entity was timely. In OSHA proceedings, defendants claimed the defendant failed to sue the company that employed him at the time of his termination. When the plaintiff sought leave to amend his complaint to name this company as a defendant, they argued the amendment was untimely. The district court agreed, denied the motion to amend, and granted the motion to dismiss for failure to name the plaintiff’s employer at the time of his termination. The Fifth Circuit affirmed the denial of the amendment but overruled the dismissal of the complaint, holding it plausibly alleged a claim against the company plaintiff sued.

Raymond Vuoncino was VP of Operations for UPS Fabrication, LLC (“Fabrication”). Fabrication and UPS Pipe and Foundry Company (“Foundry”) were subsidiaries of USP Holdings, Inc. (“Holdings”). In 2016, Holdings was acquired by Forterra, Inc. (“Forterra”) whose CEO told Vuoncino that he was disappointed in Fabrication’s earnings. Fabrication’s president then developed a plan to increase Fabrication’s yearly earnings by \$12 million through inter-company sales. In the structure ultimately implemented, Foundry charged Fabrication the normal price for inter-company sales but later paid a rebate to Fabrication, thereby increasing Fabrication’s profit through these inter-company transactions.

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Vuoncino expressed concern about the propriety of these inter-company sales and met with Fabrication employees to ensure they agreed on the proper accounting treatment. All agreed the proper method would be to show the rebate on Fabrication's profit and loss statement ("P&L") but record the profit only after Fabrication sold the product to its customers. However, once the program began, Fabrication's controller told Vuoncino that the rebate would be "recognized each month as immediate profit" on the P&L. Vuoncino objected to this "fraudulent accounting" and raised his objection with Fabrication's president and other executives in December 2016. In January 2017, Vuoncino learned that Foundry was also shipping Fabrication products it had never ordered. Vuoncino believed these shipments were a way for Fabrication to "cook the books" and inflate its profits. When Vuoncino raised his objections again with Fabrication's president, he was fired – although the company announced that he left voluntarily.

Vuoncino filed a retaliatory discharge complaint with OSHA on June 6, 2017, naming U.S. Pipe, Inc. and Forterra as defendants. Forterra responded on behalf of itself, Holdings, and Fabrication, asserting that Vuoncino's charges were brought "against Fabrication" but Foundry was his true employer. When OSHA did not issue a final agency order within 180 days, Vuoncino filed a complaint in the District of New Jersey against Forterra, its CEO, and the president of Fabrication but did not name Fabrication, Foundry, or Holdings as defendants. Approximately two years later, the New Jersey court permitted Vuoncino to file a first amended complaint naming Fabrication as a defendant. The case was then transferred to Texas where a substantial part of relevant events occurred.

In the Texas proceedings, Vuoncino sought leave to file a second amended complaint adding Foundry and Holdings as defendants – the two companies defendants claimed employed him at various times. The district court denied the motion as untimely. Defendants then refiled their motion to dismiss the SOX claim against Fabrication and other defendants arguing (a) Vuoncino did not sue his employer (Foundry) as evidenced by W-2 statements they attached to the motion to dismiss, and (b) Vuoncino did not adequately plead that Forterra was the alter ego of his employer. The district court granted the motions to dismiss and denied a motion for reconsideration. Vuoncino appealed.

The Fifth Circuit ruled that the district court did not abuse its discretion in denying leave to amend. The proposed amendment adding Foundry and Holdings as defendants was untimely because the statute of limitations for the SOX retaliation claim had expired, and the proposed amendment did not relate back to the original complaint. Specifically, the proposed amendment failed the third condition for adding a party under Rule 15(c) of the Federal Rules: the unnamed party must have known within the initial period for serving the complaint that the action would be brought against it. Vuoncino was not entitled to equitable tolling because he knew at the time his federal complaint was filed that defendants claimed Foundry was his true employer.

But the Fifth Circuit also overruled the district court's dismissal of the SOX retaliation claim against Fabrication. To prevail on such a claim, an employee must prove by a preponderance of the evidence that (1) the employee engaged in protected activity; (2) the employer knew the employee engaged in such activity; (3) the employee suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor to the unfavorable action. *Id.* at *4 (citing *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)). The whistleblowing employee must also allege that there was an employer-employee relationship between the retaliator and the whistleblower. *Id.* (citing *Lawson v. FMR LLC*, 571 U.S. 429, 441-42 (2014)).

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The Fifth Circuit ruled that the complaint plausibly alleged a claim against Fabrication despite the W-2 evidence which the Court suggested was improperly considered on a motion to dismiss. Specifically, the complaint alleged that Vuoncino was hired by “USP” which was defined to include U.S. Pipe, Inc., Holdings, Fabrication, and Foundry. It further alleged that he worked for Fabrication, was the General Manager of Fabrication, was supervised by Fabrication’s VP, and had daily involvement in Fabrication’s functioning. When he was terminated, he received a letter stating that his position was being terminated due to restructuring of Fabrication. Based on the totality of these allegations and viewing the complaint in the light most favorable to Vuoncino, the Fifth Circuit reversed the district court dismissal of the claim against Fabrication. Otherwise, it upheld the dismissal of the claims against all other parties.

3. *SEC v. Barton*, __ F.4th __, 2025 WL 1134893 (5th Cir. Apr. 17, 2025) (Willett, J.)

In this second appeal of an SEC receivership case, the Fifth Circuit affirmed rulings by Judge Starr imposing a receivership over multiple entities that received or benefitted from assets traceable to defendant’s alleged fraudulent activities. The Court also affirmed Judge Starr’s decision to freeze the assets of other defendant-controlled entities until additional tracing could be completed. The Court seemed particularly swayed by the fact that *after he was indicted* the defendant continued to use hundreds of thousands of dollars in investor funds to pay for his legal and personal expenses. The opinion provides a roadmap of the legal standards for receivership actions.

Timothy Barton was involved in a scheme to develop underutilized land with assistance from loans given by Chinese nationals. The SEC and DOJ opened parallel civil and criminal proceedings against Barton and his associates. The SEC brought fraud charges and asked the Court to impose a receivership. Instead of applying the three-part test for receivership set forth in *Netsphere, Inc. v. Baron*, 703 F.3d 296, 305 (5th Cir. 2012) (*Netsphere I*), the district court applied a test used in cases where injunctive relief had already been granted. The Fifth Circuit reversed, ruling that the district court abused its discretion by including all Barton-controlled entities without first finding that they received or benefitted from the ill-gotten funds.³

On remand, the SEC again asked the district court to impose a receivership over multiple entities. The district court granted receivership over 54 of the 82 entities identified by the SEC and entered a preliminary injunction freezing the assets of other Barton-controlled entities until additional asset tracing could be completed. Barton appealed, arguing primarily that (1) the federal court lacked jurisdiction because the loans at issue were not securities; (2) the district court abused its discretion by appointing a receiver and including so many entities within the receivership; and (3) the district court applied the wrong legal standard in granting the preliminary injunction freezing assets.

The loans are securities. The Fifth Circuit first addressed jurisdiction and ruled that the loans were securities under the four-part *Howey* test. Chinese nationals made an “investment of money” in the loan agreements which were promoted as investments with a 10% return and higher profits than overseas bonds. They invested in a “common enterprise” with an “expectation of profits” because they relied on the promoter’s expertise and on the promotional materials touting profits they would

³ See FH 2Q23 Newsletter, at 6-8 (discussing *SEC v. Barton*, 72 F.4th 640 (5th Cir. 2023)).

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make. Finally, the profits were generated “solely from the efforts of others” than the Chinese nationals who executed the loan agreements.

Receivership issues. The Court ruled that the district court did not abuse its discretion in imposing a receivership or in the scope of entities it included. The district court followed the three-part *Netsphere I* test for imposing a receivership: (1) was it clearly necessary to protect a party’s interest in property; (2) were less drastic remedies inadequate; and (3) did the benefits of receivership outweigh the burdens. Without receivership, the properties would be subject to millions of dollars in foreclosure costs, as well as the continued dissipation of investor assets by Barton who went on a post-indictment “spending spree” using hundreds of thousands of dollars in investor funds for his own legal and personal expenses.

In selecting the entities for receivership, the district court followed the “received-or-benefitted-from rule” the appellate court had articulated in the first appeal of this case. Applying this rule, the district court chose to impose receivership on only 54 of the 82 entities identified by the SEC, did not extend the receivership up the chain of ownership, and used an asset freeze order to keep certain entities outside of the receivership. Barton complained that the SEC presented tracing evidence from the receiver and a staff accountant instead of from an expert witness, but the Court noted the tracing evidence came from actual financial records of the entities and that Barton’s expert did not perform his own tracing analysis or specifically opine that even one entity placed in receivership had not received or benefitted from investor funds. Barton also raised other issues about the Court’s administration of the receivership such as ratifying actions of the first receivership, approving appraisals, and approving property sales. The Court noted that due to a “‘wrinkle’ in our precedent,” it only had jurisdiction to review the district court’s approval of property sales and ruled they were not an abuse of discretion. *Id.* at *9-11.

Preliminary injunction freezing assets controlled by Barton. The U.S. Supreme Court recently stated that absent a clear command from Congress, courts are required to adhere to the traditional four-factor test for a preliminary injunction set forth in *Winter v. Natural Res. Defense Council*.⁴ The district court in *Barton* appeared to focus on a different, two-part test for SEC injunctive actions that only required a “reasonable likelihood” of violating the federal securities laws. However, the district court also cited and analyzed *Winter’s* four-part test in a footnote. The Fifth Circuit noted: “The Supreme Court has not mandated that such analysis is in the body of the opinion versus a footnote – only that the analysis is completed.” *Id.* at *12. The Court then reviewed the four factors and concluded the district court did not abuse its discretion in entering a preliminary injunction freezing assets of other Barton-controlled entities. Notably, in response to Barton’s argument that assets should not be frozen until the SEC presents evidence to support the freeze, the Court stated:

While the “[t]he general federal rule of equity is that a court may not reach a defendant’s assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment[,]” as Barton emphasizes, such

⁴ *Starbucks Corp. v. McKinney*, 602 U.S. 339, 348 (2024) (vacating NLRB preliminary injunction based on two-part test that asked whether “there is reasonable cause to believe that unfair labor practices occurred” rather than traditional four-part test set forth in *Winter v. Natural Res. Defense Council*, 555 U.S. 7 (2008)). The traditional *Winter* test for a preliminary injunction includes four parts: likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief, balance of equities tips in his favor, and injunction is in the public interest.

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a rule does not apply here. The asset freeze is merely to determine which assets are the subject matter of the litigation.

Id. at *13. It is unclear whether this exception to the general rule (to determine which assets are the subject matter of litigation) is a one-off for this case or will have broader application.

C. District Courts

1. *In re AT&T Inc. Secs. Litig.*, 2025 WL 1685840 (N.D. Tex. June 16, 2025) (Godbey, J.)

Judge Godbey dismissed a putative securities fraud class action complaint against AT&T and its officers without prejudice, giving plaintiffs thirty days to file an amended complaint. The First Amended Complaint (“FAC”) alleged that various statements about efforts to retire old telecom lines were false and misleading because they did not disclose the risks AT&T faced from its widespread and deteriorating network of lead-lined cables. This concern was raised in a *Wall Street Journal* expose titled “America is Wrapped in Miles of Toxic Lead Cables” that was published on July 9, 2023. The Court ruled the FAC adequately alleged some false statements but dismissed the complaint for failure to allege a strong inference of scienter against any of the defendants.

Plaintiffs alleged that four groups of statements were false and misleading: (1) statements on cost savings; (2) statements on environmental stewardship; (3) statements on employee health and safety; and (4) risk statements. The Court found that certain statements about cost savings and environmental stewardship were actionable. Plaintiffs adequately alleged “the complete chain of inferences necessary to connect the statements about cost savings to the alleged material liability from lead-lined cables.” *Id.* at *9. Moreover, most of the alleged statements were neither opinions nor forward-looking statements protected by the PSLRA’s safe harbor. While many of the environmental stewardship statements were immaterial statements of generalized positive goals or not specifically linked to lead-lined cables, the Court found three statements suggesting materials were recycled were inconsistent with factual allegations that lead-lined cables were left in place despite the risk that lead would leach into the environment.

Despite finding some actionable false or misleading statements, the Court ruled the FAC failed to raise a strong inference of scienter as to any defendant. First, much of the FAC relied on improper group pleading. *Id.* at *5 (“Plaintiffs must ‘distinguish among those they sue and enlighten *each* defendant as to his or her particular part in the alleged fraud.’”) (citing *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 365 (5th Cir. 2002)). Thirty-five of the alleged false statements were found in unsigned “Issue Briefs” attributed only to AT&T. Plaintiffs argued that an introductory letter from the CEO was enough to link the Issue Briefs to him, but the introductory letter was part of an annual Corporate Sustainability Report and the Issue Briefs were only referenced in a “read more” section of that report. The Court stated: “This is a far cry from adopting or reasserting the statements in the Issue Briefs.” *Id.*

Second, the allegations of motive were insufficient to establish a strong inference of scienter. Plaintiffs alleged defendants were motivated by (1) the need to reduce costs after AT&T acquired two financially-disastrous businesses and increased its net debt to more than \$180 million; and (2) AT&T executives desired to increase their incentive compensation. The Court quickly rejected those motives as insufficient. “[T]he desire to reduce costs is a motivation held by all businesses and is so generic as to be nonactionable.” *Id.* at *6 (citing *In re Alamosa Holdings, Inc.*, 382 F.Supp.2d 832, 860 (N.D. Tex.

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2005)). As for incentive compensation, if that motive were enough, “the executives of virtually every corporation in the United States would be subject to fraud allegations.” *Id.* (citing *Yoshikawa v. Exxon Mobil Corp.*, 2022 WL 4677621, at *6 (N.D. Tex. Sept. 29, 2022)).

Third, the court reviewed the specific allegations against each of the individual defendants and found them insufficient. For example, as to defendant John Stanley, AT&T’s COO from October 2019 – June 2020 and CEO since then, the Court stated: (1) leading a team tasked with reclaiming copper wire was not sufficient to allege knowledge of lead-lined cables and their risks; (2) knowledge that disposal of lead-acid batteries posed reputational and legal risks was not sufficient to show knowledge that lead-lined cables were being disposed of carelessly, and (3) knowledge of one lawsuit about lead-lined cables with a disputed factual basis did not impart knowledge that the entire network was subject to material risks. *Id.* at *7. “[R]egardless of whether Stanley knew in the abstract that lead was a hazard in the environment or to AT&T’s employees, the complaint fails to allege Stanley was ever provided information or believed that those lead cables were emitting lead into the environment in any widespread way that could pose severe risks to the business.” *Id.* The more persuasive inference is that “Stanley believed AT&T’s wireline transformation would reduce costs and had no information that would give notice of severe risks in that effort.” *Id.*

After finding no inference of scienter against any of the individual defendants (and, therefore, no inference of corporate scienter), the Court addressed plaintiffs’ scheme liability claim. The Court dismissed this claim because plaintiffs did not make any argument against dismissal, and “Rule 10(b) requires Plaintiffs to separately plead a scheme-liability claim if it is in any way distinct from their misstatement claim.” *Id.* at *12 (citing *Linenweber v. Southwest Airlines Co.*, 693 F.Supp.3d 661, 687 (N.D. Tex. 2023)).

2. *In re Concho Resources, Inc. Secs. Litig.*, 2025 WL 1040379 (S.D. Tex. Apr. 7, 2025) (class certification) and *In re Concho Resources, Inc. Secs. Litig.*, 2025 WL 1042411 (S.D. Tex. Apr. 7, 2025) (expert testimony)

Judge Andrew Hanen certified two subclasses of purchasers of Concho stock in this securities class action and denied plaintiffs’ motion to exclude testimony from defendants’ expert witness on class certification and damages issues. The Court’s analysis focuses on the predominance requirement for class certification and what evidence is needed to demonstrate loss causation, including front-end price impact and back-end price impact. It also addresses the different damages theories and plaintiffs’ requirement under *Comcast v. Behrend*, 569 U.S. 27, 35 (2013), to demonstrate that their proposed damages theory is consistent with their theory of liability.

Factual background⁵

Concho is an E&P company. During the proposed class period, it began drilling multiple wells in close proximity to each other, describing the projects as “large-scale development” or “manufacturing mode.” In one important project called Dominator, Concho told investors they had “valuable data” they used to optimize well design (including spacing of wells) and well completion.

⁵ For additional factual background, see FH 1Q23 Newsletter, at 8-12 (dismissal without prejudice) and FH 1Q24 Newsletter, at recommending denial of motion to dismiss); FH 2Q23 Newsletter, at 9-10 (adopting recommendation).

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During the proposed class period, Concho also announced a definitive agreement to acquire RSP Permian in an all-stock transaction (the “RSP Acquisition”). Under the terms of the acquisition, each RSP shareholder would receive 0.320 shares of Concho stock, representing consideration of \$50.24 per share based on the closing price of Concho stock on March 27, 2018—a date within the proposed class period when Concho’s stock was allegedly inflated. The RSP Acquisition reflected a 29% premium over RSP’s closing price.

Lead Plaintiffs alleged that Concho’s “manufacturing mode” was based on experimental and highly risky production methodologies. The truth emerged when Concho released its 2Q19 financial results after the close of trading on July 31, 2019. Concho disclosed that its well spacing the Dominator project was too tight and that other projects were constructed with tighter spacing as well. After these disclosures (the Corrective Disclosure), Concho’s price dropped 22% the following day.

Class Certification

The lead plaintiffs sought to certify a class of those who purchased or otherwise acquired Concho stock during the period February 21, 2018 through July 31, 2019, inclusive. Plaintiffs had the burden to demonstrate that the proposed class and lead plaintiffs met the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and Rule 23(b)(3) (predominance). While the Court found the lead plaintiffs met these requirements for all “open market purchasers” of Concho stock, the Court ruled the lead plaintiffs were not adequate representatives for those who obtained their shares of Concho through the RSP Acquisition. Accordingly, the Court formed two subclasses, granted the motion for certification of the subclass of open market purchasers, and denied the motion for certification of the subclass of RSP Acquisition plaintiffs. The Court ordered plaintiffs to submit the names of proposed RSP Acquisition subclass representatives within 60 days.

Defendants did not argue about Rule 23(a) requirements but focused on the lack of predominance of issues for the class. Specifically, they argued (1) individual issues of reliance predominated on the alleged misrepresentations, and (2) plaintiffs’ damages could not be measured on a class-wide basis consistent with their theory of liability.

Reliance on Alleged Misrepresentations

Plaintiffs invoked the rebuttable presumption of reliance based on the fraud-on-the-market theory as described in the Supreme Court’s *Basic v. Levinson* opinion. Plaintiffs acknowledged they were proceeding under an “inflation-maintenance theory” where “price impact is the amount of price inflation maintained by an alleged misrepresentation—in other words, the amount that the stock’s price would have fallen without the false statement.” *Id.* at *12 (citing *Goldman I*, 594 U.S. at 123).

Defendants presented evidence that the alleged representations had no impact on the stock price and, thereby, defeated the *Basic* presumption of reliance. Defendants grouped the alleged misstatements into four categories that the Court used to evaluate whether defendants “sever[ed] the link between a misrepresentation and the price paid by the plaintiff.” *Id.* at *9 (citing *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113, 125-26 (2021)). The four groups were (A) generic statements; (B) results and observations from 2017 & 2018; (C) pre-2019 projections for 2018; and (D) other statements that were not challenged on price impact grounds. Defendants argued there was a mismatch between the corrective disclosures and the alleged false statements in categories (a), (b), and (c), and thus no price impact for these alleged misstatements.

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First, as to 33 generic statements (Category A), Defendants invited the Court to adopt the reasoning of *Shupe v. Rocket Companies, Inc.*, 2024 WL 4349172 (E.D. Mich. Sept. 30, 2024) that ruled the absence of any reference to the generic statements in sell-side analyst reports was “fatal” and sufficient to sever the link. The Court refused to accept the *Shupe* court’s absolutist view about all generic statements, but it ruled there was no price impact for 16 generic statements that fell into the category of general business principles and/or puffery. *Id.* at *14 (listing examples of generic statements from the Supreme Court’s *Goldman I* decision).

Second, as to results and observations from 2017 & 2018 (Category B), defendants argued there was a mismatch between them and the corrective disclosures about second quarter 2019 financial results. Plaintiffs countered that the corrective disclosures in 2019 revealed that Concho omitted or concealed the truth in its 2017 and 2018 statements. The Court agreed with the following argument by Plaintiffs:

Plaintiffs argue that the Corrective Disclosure corrects the Category B misstatements by revealing the omitted/concealed truth: that Concho continued to claim it had proven manufacturing mode methodologies when in reality they did not and needed to go “back to the drawing board on well spacing.” Plaintiffs state that Defendants’ repeatedly and baselessly “touted the benefits of the ‘large-scale project development.’” Since Defendants had no evidence to support, or misrepresented, the evidence of the benefits of the large-scale project development, Lead Plaintiffs conclude that the Category B statements were subsequently corrected “upon revelation of Concho’s well-spacing woes.” Specifically, the Corrective Disclosure revealed that Concho had to halve its active rig count while keeping its budget the same, which Lead Plaintiffs argue corrects the earlier statements that the large-scale project developments were generating cost savings for the company. .

Id. at *16 (evidentiary citations omitted). Nonetheless, the Court agreed there was a mismatch between some of the Category B statements and the corrective disclosure, specifically, statements about the 2017 and 2018 actual results and statements discussing the switch to manufacturing mode generally. *Id.* The Court ruled that four Category B statements were severed from the corrective disclosures.

Third, Defendants argued that statements about pre-2019 projections (Category C) were not related to the corrective disclosure of financial results in 2019, and the Court agreed. While Plaintiffs argued the financial forecasts were misleading because they represented they were conservative and following historical norms, the Court was unpersuaded. “A statement to expect ‘more of the same’ in one year [2018] cannot be corrected by a statement regarding the results in a different year [2019].”

Thus, although the Court ruled the Defendants severed the connection between some of the alleged misstatements and the corrective disclosures, it ruled: “With respect to those remaining statements, Plaintiffs have met their burden under Rule 23(b)(3)” *Id.* at *17.

Plaintiffs’ Damages Model

Defendants argued that plaintiffs were proceeding under a “materialization-of-the-risk” theory of loss causation and must present more evidence at the class certification stage than just a plan to do an event study in the future. *Id.* at *18 (citing *In re BP p.l.c. Sec. Litig.*, 2013 WL 6388408, at *16 (S.D. Tex. Dec. 6, 2016)). The Fifth Circuit stated that the materialization-of-the-risk theory is used “where

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the ‘investors are harmed by [] corrective events that represent materializations of the risk that was improperly disclosed.’” *Id.* (quoting *Ludlow v. BP, P.L.C.*, 800 F.3d 674, 689 (5th Cir. 2015)). Plaintiffs denied they were proceeding on that theory, that it was only pleaded in the alternative, and that they were proceeding only on a “corrective disclosure” theory. The Fifth Circuit stated “the ‘corrective disclosure theory’ is used when ‘a release of information [] reveals to the market the pertinent truth that was previously concealed or obscured by the company’s fraud.’” *Id.* (citing *Amedisys*, 769 F.3d at 321)).

The Court rejected Defendants’ argument. It ruled the corrective disclosure theory was consistent with the plaintiffs’ theory of damages as required by the Supreme Court’s ruling in *Comcast*. *Id.* at *19 (citing 569 U.S. at 35). The Court stated:

While Plaintiffs may face a number of hurdles in actually proving loss causation, they are not required to make this showing until the merits stage. . . . Plaintiffs’ burden at this stage is simply to propose a methodology for calculating damages that corresponds to their theory of liability and can be applied class-wide. They have done so here. Plaintiffs proposed methodology, which applies on a class wide basis, is capable of measuring the out-of-pocket losses suffered by the Proposed Class.

Id. at *20.

Subclass for RSP Acquisition

In addition to their other arguments, Defendants complained that plaintiffs’ damages methodology was inconsistent with respect to pre-acquisition Concho shareholders and RSP shareholders who converted their RSP stock.

With respect to the pre-acquisition Concho shareholders, Defendants argue that, if it is true that the alleged fraud inflated the price of Concho’s stock prior to the RSP Acquisition, then Concho necessarily used the inflated shares as merger consideration. The pre-acquisition Concho shareholders thus received an economic benefit that Coffman’s proposed damages methodology “makes no effort” to correct.

Defendants also argue that the premium a former RSP shareholders received in the RSP Acquisition (29% above the market price for their RSP stock) should “offset” any alleged loss suffered by a former RSP shareholder. As such, Defendants contend that the former RSP shareholders cannot be included as members of the Proposed Class because the net benefit they received via the stock swap creates a fundamental conflict between the former RSP shareholders and the remaining Proposed Class members.

Id. at *20 (citations omitted). The plaintiffs argued the damages methodology could account for any differences and there was no conflict of interest because the premium was not a product of the fraud. While the Court disagreed that the damages issues precluded certification, it ruled that “any grouping that includes open market purchasers and former RSP shareholders may pose difficulties in managing the class action, particularly in trying the case.” *Id.* at *21. Accordingly, it decided to certify two subclasses and to allow counsel to submit applications for new lead plaintiffs for the RSP Acquisition.

Motion to Exclude Defendants' Expert

As described above, Defendants presented evidence through expert testimony by economist Lucy P. Allen. Plaintiffs moved to exclude her testimony but conceded they were not relying on front-end price impact evidence that was the subject of some of Allen's opinions. Plaintiffs also offered a rebuttal expert report from Chad Coffman. In a separate opinion, 2025 WL 1042411, the Court denied plaintiffs' motion to exclude Allen's testimony, finding that Allen employed a qualitative analysis that included some subjectivity but was "generally reliable" and not "junk science." *Id.* at *7. Any criticism of her coding of analyst reports went to the weight of her testimony, not admissibility. *Id.* If she failed to identify news articles that she reviewed, any error was harmless because her analysis focused solely on analyst reports. Finally, Allen's opinions about the benefit to Concho shareholders who used allegedly inflated shares for the merger may be disputed by plaintiffs, but they were not inadmissible. *Id.* at *9.

3. *In re Cassava Sciences, Inc.*, 2025 WL 1465045 (W.D. Tex. May 21, 2025)

In this long-running securities fraud class action, Judge Ezra granted plaintiffs' motion to file a second amended complaint and struck defendants' motion to exclude a rebuttal report of plaintiffs' class-certification expert witness. The plaintiffs allege that Cassava misrepresented research on simufilam, a potential treatment for Alzheimer's disease, by manipulating data and failing to disclose conflicts of interest. The court previously denied defendants' motion to dismiss, and it ruled that plaintiffs' motion for class certification was premature until the motions to amend and to strike were addressed.⁶

Motion to Amend

Plaintiffs' motion to file a second supplemental complaint was filed after the deadline to file amended pleadings passed and class certification briefing was completed. The decision to permit post-deadline amendments is governed by Rule 16(b) of the FEDERAL RULES OF CIVIL PROCEDURE, which requires the judge's consent and good cause. FED. R. CIV. P. 16(b)(4). To determine whether there is good cause, courts consider four factors: (1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice. *Id.* at *2 (citing *E.E.O.C. v. Serv. Temps Inc.*, 679 F.3d 323, 334 (5th Cir. 2012)). While a court may weigh in the movant's favor any prejudice that arises from denial of leave to amend, that factor is only relevant if there are substantial reasons to deny the amendment. *Id.* at *2 (citing *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. 1981)).

Plaintiffs sought to supplement their complaint to add several events that all occurred after the deadline to amend passed, including (1) the indictment of one defendant, (2) a press release regarding the resignation of two other defendants, and (3) SEC charges filed against the company and two individual defendants. Plaintiffs also maintained that they did not seek to expand the Class Period but to allow them to recover damages for more recent corrective events. The Court ruled that the amendment would not prejudice the defendants. It also noted the Supreme Court's admonition in

⁶ See FH 2Q23 Newsletter, at 10-13 (denying motion to dismiss) and 2025 WL 1011785 (W.D. Tex. Feb. 25, 2025 (denying motion for class certification without prejudice)).

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Amgen that “[i]oss causation and the facility or misleading nature of the defendants’ alleged statements or omissions are common questions *that need to be adjudicated before a class is certified.*” *Id.* at *3 (citing *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 475 (2013) (emphasis added)). Based on this analysis, the Court granted the plaintiffs’ motion to file a second supplemental complaint.

Motion to Strike Defendants’ Motion to Exclude

After the magistrate judge issued a recommendation to certify the class, defendants moved to exclude plaintiffs’ experts’ initial and rebuttal reports because Dr. Steven Feinstein’s opinions on market efficiency stemmed from a fatally flawed, circular definition of “efficiency.” Plaintiffs then moved to strike defendants’ motion as untimely since the magistrate judge had set a deadline for class certification evidence and made her recommendation.

The Court ruled the defendants’ motion to exclude was untimely and repetitive of arguments presented in a sur-reply to the experts’ rebuttal report. It granted plaintiffs’ motion to strike because “Defendants’ Motion to Exclude is an attempt to rehash arguments already made and considered in the prior class certification briefings.” *Id.* at *5.

4. ***Edwards v. First Trust Portfolios L.P.*, 2025 WL 1678159 (N.D. Tex. June 12, 2025) (Horan, M.J.)**

Magistrate Judge David Horan ruled in favor of the defendant on a whistleblower retaliation claim after a jury trial and rejected plaintiff’s motion for a new trial. Aaron Edwards filed a whistleblower retaliation claim under SOX and Dodd-Frank after he was terminated by First Trust, a registered broker-dealer. The defendant’s motion for summary judgment was denied, and the case proceeded to trial.⁷ The jury returned a verdict in favor of defendant First Trust on plaintiff’s SOX claim and an advisory verdict in defendant’s favor on plaintiff’s Dodd-Frank claim. Since few cases have discussed the standards applicable to Dodd-Frank whistleblower claims, we discuss that portion here.

Dodd-Frank established a corporate whistleblowing reward program, accompanied by a new provision prohibiting any employer from retaliating against a whistleblower for providing information to the SEC, participating in an SEC proceeding, or making disclosures required or protected under Sarbanes-Oxley and other securities laws. In the Dodd-Frank Act, a whistleblower is defined as an individual who provides information relating to a violation of the securities laws to the Commission. Thus, Dodd-Frank whistleblower protections extend only to individuals who provide information to the SEC. *Id.* at *2.

No district court has yet articulated the elements for a prima facie case under Dodd-Frank, but the magistrate judge adopted the well-established framework in other retaliation cases. Under Dodd-Frank, a plaintiff must show (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.* (quoting *Slavin v. Bank of Am. Merch. Servs.*, 491 F.Supp.3d 1334 (N.D. Ga. 2020)).

⁷ For additional factual background, see FH 1Q25 Newsletter, at 6-7.

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The evidence at trial showed that plaintiff Edwards reported his concerns about First Trust's year-end gift policy to the SEC on May 20, 2022, describing it as an illegal sales contest under SEC and FINRA regulations. It was undisputed that Edwards was terminated on May 23, 2022. The sole remaining questions were whether Edwards engaged in protected activity and possessed a reasonable belief (subjectively and objectively) that the information he provided to the SEC related to a possible securities violation. *Id.* at *3.

Although Edwards testified that he subjectively believed the gift policy violated SEC rules, the evidence at trial established that he was told it did not, that Edwards had participated in the gift-giving process in prior years, and that Edwards told a co-worker that he might have to use his belief that the gift policy violated SEC rules as “leverage” to keep his job at First Trust. Based on this evidence, the Court concluded that Edwards did not have a subjective belief, and no evidence was presented at trial that a reasonable person in the same circumstances would have believed so. Indeed, two of his co-workers testified that they did not believe the gift policy violated SEC rules.

Because the Court concluded that Edwards did not engage in protected activity, there was no causal connection between protected activity and his termination and there was no violation of Dodd-Frank. In addition, the Court noted there was no evidence that Edwards' supervisors were aware at the time they decided to terminate him that he had reported his concerns to the SEC. Likewise, the decision to terminate Edwards was made before he complained internally about the gift policy.

5. *Licht v. Ling*, 2025 WL 1592958 (N.D. Tex. June 5, 2025) (Starr, J.)

After entering a preliminary injunction against Tina Ling and an entity named Luxkey – two defendants who never appeared at the hearing – Judge Starr issued a default judgment against them and permanently froze their cryptocurrency wallets until the plaintiff was able to access and recover the stolen funds in them. The facts are repeated below to share another cryptocurrency investment scheme and the naivete of some investors:

In June 2021, a few years after his wife's death, Licht received a Facebook message from a woman named Tina Ling. Licht and Ling conversed for several months via the Facebook HangOuts app. Eventually, at Ling's urging, Licht agreed to become a passive investor in a cryptocurrency mining pool—or so he thought. Ling introduced Licht to Luxkey, an online enterprise that she assured him would safely facilitate his investment and ensure his principal was never at risk. Ling instructed Licht about downloading the Coinbase app, which displayed what appeared to be the yields of his mining investments. Encouraged, Licht continued investing.

Once Licht had invested \$500,000 in Luxkey, things started to go south. Ling told Licht—for the first time—that he had to invest at least \$2,000,000 or he'd risk being charged fees and fines. Licht complied. Then, Ling and others at Luxkey told Licht he owed a “miner's fee” of 20%, or \$400,000. Worried, Licht paid it. Ling offered to loan Licht \$100,000 to pay the fee and Licht accepted. Then, others at Luxkey admonished Licht that such a loan was not permitted and fined him another \$300,000. When Licht contacted Luxkey about the fine, he was told that he owed an additional \$400,000, but at that point, having invested almost all of his life savings, Licht could pay no more.

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At this point, things took a dark—if sadly predictable—turn. Luxkey informed Licht that his funds would be frozen and distributed to the other investors in the cryptocurrency mining pool. His Coinbase wallet was remotely accessed, and his funds were transferred away. It is now clear to Licht that the “mining pool” never existed, Licht was the only member, and the entire enterprise was designed to maximize Licht's investment before stealing it.

All told, Licht invested \$2,755,000 in Luxkey and he lost every dollar. In his declaration, Licht states that he never would have invested in Luxkey if he'd known that his “principal would be at risk, that there would be minimum investment amounts, or that there would be fines or other charges.”

Licht hired a “blockchain forensics and cybercrime investigative firm” to trace the stolen funds. The investigation yielded the addresses of several specific cryptocurrency wallets located across various cryptocurrency exchanges or platforms.

Id. at *1.

6. ***Cross v. MortgageIT, Inc.*, 2025 WL 1839448 (S.D. Tex. May 29, 2025) (magistrate judge recommendation) and 2025 WL 1837740 (S.D. Tex. July 2, 2025) (adopting recommendation)**

Magistrate Judge Peter Bray recommended denial of a motion to dismiss a *pro se* complaint filed against a mortgage lender that allegedly failed to properly effectuate the transfer of servicing rights to a mortgage. The mortgage lender claimed it had not had any involvement with the mortgage in nearly two decades and sought dismissal on limitations of all counts. The eighteen claims asserted by the plaintiff included breach of contract, securities fraud, breach of the duty of good faith and fair dealing, and RICO. Because the motion to dismiss raised multiple issues outside the pleadings, Judge Bray recommended denying the motion to dismiss without prejudice to re-urging the same issues in a summary judgment motion. Judge Eskridge adopted the magistrate judge's recommendation.

The defendant asked the Court to take judicial notice of arguments and facts asserted in a bankruptcy case previously filed by the plaintiff. The Court stated: The court “may take judicial notice of public records, though it may not take judicial notice of ‘adjudicative facts’ subject to reasonable dispute.” *Payne v. City of Houston, Tex.*, No. 24-20150, 2025 WL 999085, at *1 (5th Cir. Apr. 3, 2025). The court may not take judicial notice of factual content within the exhibits of a separate case. *Id.* at *1.

Payne was a wrongful death action brought under the Texas Tort Claims Act. With respect to judicial notice, the Fifth Circuit stated the longstanding rule that a court must accept the well-pleaded facts in a complaint as true and not consider facts outside the complaint. However, there are two exceptions to this general rule: “(1) the district court may consider documents attached to the motion to dismiss if they are referred to in the complaint and central to their claims (incorporated by reference); and (2) the district court may take judicial notice of public records, though it may not take judicial notice of ‘adjudicative facts’ subject to reasonable dispute, which generally include the factual findings of another court.” *Payne*, 2025 WL 999085, at *1.

As experienced securities practitioners know, there is another exception that allows courts to take judicial notice of SEC filings in securities cases. “SEC filings ... may be properly judicially noticed

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to the extent that they are ‘considered only for the purpose of determining what statements the documents contain, not to prove the truth of the documents’ contents.’” *Petrobras America, Inc. v. Samsung Heavy Indus. Co.*, 9 F.4th 247 (5th Cir. 2021) (quoting *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996)). This rule is widely followed by Texas federal courts. See *Targgart v. Next Bridge Hydrocarbons, Inc.*, ___ F.Supp.3d ___, 2025 WL 1831590, at *_ n.3 (N.D. Tex. July 3, 2025) (“At the pleading stage, the Court may take judicial notice of documents in the public record, including documents filed with the Securities and Exchange Commission, such as the registration statement.”); *Schneider v. Natera, Inc.*, 2025 WL 1499218, at *5 (W.D. Tex. Mar. 21, 2025) (“[I]n securities cases, courts may take judicial notice of the contents of public disclosure documents that the law requires to be filed with government agencies, such as the SEC, and that are actually filed with the agency.”); *Linenweber v. Southwest Airlines Co.*, 693 F.Supp.3d 661, 674 (N.D. Tex. 2023) (taking judicial notice of SEC filings “only for the purpose of determining what statements the documents contain, not to prove the truth of the documents’ contents” and taking judicial notice of Southwest’s stock price as a fact not reasonably subject to dispute); *Coggins v. Camber Energy Inc.*, 693 F.Supp.3d 736, 743 (S.D. Tex. 2023) (taking judicial notice of SEC filings in the context of a motion to dismiss).

7. ***Independent Finan. Grp., LLC v. Harrison*, 2025 WL 1617411 (N.D. Tex. June 6, 2025)**

Judge Lindsay denied a motion to preliminarily enjoin two investors from pursuing a FINRA arbitration against defendant Independent Financial Group (IFG). The Court held that IFG did not present sufficient evidence to support an injunction.

The investors, Joseph and Ruth Ann Harrison, claimed they lost \$160,000 of their retirement savings by investing in risky GWG unregistered bonds at the recommendation of Justin McIntyre who became a registered representative of IFG in July 2022. They filed a FINRA arbitration claim against IFG alleging breach of contract, negligence, gross negligence, breach of fiduciary duty, vicarious liability and other claims. The investors did not dispute that their investment occurred when McIntyre was a registered representative of NPB Financial, LLC; and that NPB ceased operations and terminated its securities registration before it was acquired by IFG. However, the Harrisons claimed they had no practical ability to sue NPB after it went out of business and that they needed access to the Asset Purchase Agreement between NPB and IFG to determine whether they had a basis for successor liability.

IFG filed this action to obtain (1) declarations that the Harrisons were not customers of IFG and that IFG had no duty to arbitrate with them and (2) an injunction prohibiting them from arbitrating their claims. IFG asserted that it purchased NPB’s assets in 2022 through a transaction that FINRA had reviewed and approved. It further asserted that the Harrisons never signed paperwork with IFG, never signed any arbitration agreement with IFG, and that IFG never executed any transactions on their behalf. IFG also claimed that because there were no facts to support the Harrisons’ successor liability theory, it should not be required to produce the IFG-NPB Purchase Agreement because it would give “disgruntled investors unfettered access to proprietary business information regarding transactions between any FINRA members and harm competition.” *Id.* at *3.

The Harrisons countered that IFG was trying to deprive them of their right to have their dispute heard in the forum designated by the securities industry for such disputes. IFG was asking the court “to take [its] word for the terms of the transaction with NPB” which “does not, and cannot, possibly carry IFG’s high burden to seek a preliminary injunction.” The Harrisons further claimed

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they had a binding arbitration agreement with NPB that is binding on IFG as IPB's successor-in-interest. They also claimed they qualified as "customers" of IFG and that IFG should be forced to arbitrate under the "closely related" doctrine under FINRA Code Rule 12200.

The court conducted a hearing on October 15, 2024. Neither side presented any additional documentary evidence or testimony in support of their respective positions. However, because of the conclusory statements in a declaration submitted by IFG, the court ordered IFG to produce an unredacted copy of the NPB-IFG Purchase Agreement for *in camera* review.

The Court ruled that IFG had not met its burden to make a "clear showing" for a preliminary injunction. IFG had to show that the Harrisons' claims were not arbitrable, yet FINRA "requires arbitration under FINRA rules when: (1) the parties are required to do so by written agreement; *or* (2) the dispute is between a customer and FINRA member such as IFG *or* someone associated with a FINRA member, and the dispute involves the business activities of the member or associated person." *Id.* at *7 (citing FINRA R. 12200) (emphasis added). It went on to state: "Mere allegations of what an asset-only purchase consists of infers nothing more than that – an asset purchase." *Id.* at *9. The evidence relied on by IFG – a declaration of its in-house legal counsel – did not support its argument for declaratory and injunctive relief and was inconsistent with the pleadings and language in the purchase agreement. *Id.* at *10. Indeed, notwithstanding IFG's claims, the Purchase Agreement did not "disclaim liability for claims or demands by NPB's current or former clients arising out of a representative's activities before the transfer date." *Id.* at *10.

The court concluded that IFG had not satisfied the requirements for injunctive relief but expressed no opinion regarding the merits of the claims by the Harrisons. *Id.* at *16.

II. STATE CASES

A. Texas Supreme Court and Texas Business Court Cases

1. *First Sabrepoint Capital Mgmt., L.P. v. Farmland Partners Inc.*, ___ S.W.3d ___, 2025 WL 1197255 (Tex. Apr. 25, 2025) (Huddle, J.)

The Texas Supreme Court partially reversed the Dallas Court of Appeals in this case arising from an alleged "short and distort" campaign by short sellers to drive down the price of a publicly traded Real Estate Investment Trust (REIT). While the Court's opinion focused on procedural issues under the Texas Citizens Participation Act (TCPA) and whether collateral estoppel barred the claims, the description of the "short and distort" scheme and the potential roadblocks to prosecuting such a scheme should be interesting to any securities litigation practitioner.

Background

First Sabrepoint Capital Management, L.P. ("Sabrepoint") is a Dallas-based hedge fund. In February 2018, it began paying an advisory firm owned by David Matthews \$9,500 per month to conduct investment research. A few months later, a senior analyst at Sabrepoint, Donald Marchiony, sent Matthews an email about Farmland Partners Inc. (FPI), a publicly traded Colorado-based REIT, in which Sabrepoint held a short position. The email attached a slide deck with information on FPI's value and business operations. Marchiony described the attachment as a "new idea" on which he and Matthews could collaborate "if there's something juicy." He also told Matthews that Sabrepoint held

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a relatively small short position on FPI's stock but "unless we have a catalyst [we] probably won't do too much higher than that."

Mathews began researching FPI's financial condition and communicated his findings to additional Sabrepoint employees, including George Baxter, Sabrepoint's CEO. Mathews eventually wrote an article about FPI under his pseudonym "Rota Fortunae" for the financial blog "Seeking Alpha." The article painted a bleak picture of FPI's business, noting it faced a "significant risk of insolvency."

Shortly before the article was published, Mathews hired a Dallas attorney to send a letter informing FPI of the article's impending publication and offering FPI an opportunity to comment within 24 hours. FPI did not respond to the lawyer but issued a press release denying some of the article's statements. Within one day of the article's publication, FPI's stock price dropped 39%, making Sabrepoint's short position more valuable. FPI then released another public statement rebutting the article's assertions and denying that it was nearly insolvent.

FPI promptly sued Matthews – identified initially only by his pseudonym – in Colorado state court. FPI alleged the Seeking Alpha article contained false statements and was part of "short and distort" scheme. After the suit was removed to federal court, FPI amended the complaint to add as defendants Sabrepoint, Baxter, and Marchiony ("Sabrepoint Defendants"). The Sabrepoint Defendants then filed a motion to dismiss for lack of personal jurisdiction because they did not "purposefully direct" their activities to Colorado. The Colorado federal court granted their motion, noting that there was no evidence the three defendants knew about this particular article "until after it was published" and played no role in hiring the lawyer who sent the letter to FPI.

After dismissal in Colorado, FPI sued the Sabrepoint Defendants in Texas state court, asserting claims for tortious interference, deceptive trade practices under Colorado law, civil conspiracy, disparagement, and defamation. The defendants answered and asserted collateral estoppel as an affirmative defense based on the Colorado federal court's statement indicating the defendants had no involvement with the allegedly defamatory article. The defendants moved for summary judgment on collateral estoppel. FPI responded that collateral estoppel was inapplicable because the Colorado federal court adjudicated a jurisdictional question, the Colorado order did not address all the claims at issue in Texas, and its analysis of ties to the article was not "essential" to the Colorado judgment.

In addition to seeking summary judgment, the Sabrepoint Defendants moved to dismiss FPI's claims under the TCPA, arguing that FPI failed to establish a prima facie case by clear and specific evidence. The Texas federal district court heard the TCPA motion but did not rule within the 30-day period the statute prescribes. Instead, 35 days after the hearing, the Court granted both the TCPA motion and the summary judgment motion. FPI appealed both rulings.

On appeal, the Dallas Court of Appeals ruled (1) the TCPA motion, which was overruled by operation of law 30 days after the hearing, could not be granted on the 35th day; (2) it declined to address the merits of the TCPA motion; and (3) the Colorado ruling on personal jurisdiction did not preclude litigation of the Texas case because it was not preclusive and had not been litigated in Colorado. The Texas Supreme Court accepted the petition for review and made the following rulings:

- The trial court did not commit reversible error in granting the TCPA motion 35 days after the

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hearing. Although the statute prescribes a 30-day period, the trial court's ruling came only five days later before any final judgment had been issued and before Sabrepoint appealed. Since district courts have the ability to revisit rulings until they are final, any error was harmless. Accordingly, it remanded for the Court of Appeals to consider the merits of the TCPA motion.

- The Court of Appeals correctly reversed the trial court's grant of summary judgment.

2. *Westlake Longview Corp. v. Eastman Chem. Co.*, 2025 WL 1420926 (Tex. Bus. May 16, 2025) (Andrews, J.)

While this case does not involve securities or fiduciary duty claims, it discusses protective orders and Attorney's Eyes Only (AEO) designations that are often used in such litigation. The issues before the Court were whether an AEO designation was necessary and whether in-house counsel should have access to AEO information. The opinion describes the types of information that qualifies for an AEO designation, the balancing test used to determine whether specific information qualifies for the designation, and the factors relevant to determining whether in-house counsel access is needed.

The case involved a contract dispute between Westlake and Eastman relating to the sale of ethylene. Eastman sought to protect the identity of its customers, its pricing, and other commercial terms of its contracts. Westlake initially argued that it was not a competitor of Eastman, but it later admitted that it shared a legal department with affiliated entities that were competitors of Eastman. Westlake did not appear to put forth any evidence about the particular in-house attorney it proposed to have access to AEO information.

The definition of AEO material in the protective order included "confidential research and development, financial, technical, marketing, or other sensitive trade secret information." *Id.* at *1. While the Court did not opine on the scope of this definition, it noted that the specific information Eastman sought to protect – customer identities, pricing, and other commercial terms of its ethylene sales contracts – was "precisely the kind of commercially sensitive information courts have frequently afforded AEO protection." *Id.* at *3.

To determine whether specific documents and information qualify for AEO protection and whether in-house counsel should be afforded access, the Court adopted a burden-shifting, balancing test that weighed the risk of harm from disclosure against the opposing party's need for the information to properly litigate the case. Borrowing from the test for trade secret privilege under TRE 507, the Court stated:

- The designating party first must put forward evidence that (1) the information is a trade secret or other confidential research, development, or commercial information, and (2) there is a risk the [designating] party will suffer harm if it is disclosed to the other party;
- If the designating party meets its initial burden, then the opposing party must demonstrate why it needs access to the information to prosecute or defend the suit and why providing the information to the party's outside counsel and experts will not suffice. A bald assertion is not sufficient; the opposing party must demonstrate the specific purposes for which it needs the information. Typically, it must show the denial of access will actually prejudice its presentation of the case, rather than merely increase the difficulty of managing the litigation.

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Id. at *4. The Court noted that the parties did not present sufficient evidence for this balancing test but could do so later if AEO designations were challenged.

The Court then identified additional factors to consider when evaluating whether a specific in-house attorney should be given access to AEO information: (a) the risk of inadvertent disclosure or competitive use of AEO information, and (b) the need for in-house counsel access to avoid imposing a hardship. *Id.* at *6-7. For example, courts should consider whether the attorney is involved in the client's "competitive decision-making" and evaluate the in-house attorney's actual (not nominal) role in the affairs of the company. They should also consider whether the case involves "complex" or "highly technical matters" as to which in-house counsel's insights would be particularly important. The Court surveyed cases and provided examples of evidence supporting granting or denying AEO access to specific in-house counsel. *Id.* at *7. However, since the parties expressed conflicting beliefs about whether Westlake's in-house counsel was engaged in competitive decision-making and presented no specific evidence, the Court concluded that Westlake did not meet its burden to show that in-house should have access to AEO information.

B. Other Texas Cases

1. *Douglas Scott Secs., Inc. v. Wilkie*, 2025 WL 1270096 (Tex. App. – Dallas May 1, 2025) (Clinton, J.)

The Dallas Court of Appeals affirmed a traditional summary judgment ruling in favor of the plaintiff in this books and records case. The plaintiff sought the names and contact information for all the partners in three entities in which he invested. The partnerships refused on the grounds that the request was prohibited by a non-transferability restriction in the partnership agreements. The district court disagreed and awarded attorney fees to the plaintiff. The Court of Appeals affirmed.

Plaintiff Daniel Wilkie requested the names and contact information for the partners in three partnerships: Golf Course Partnership #1, Diamondback Too Partnership, and Rattlesnake Mound Partnership. He made the request to the partnerships' managing general partner and to the chief compliance officer at Douglas Scott Securities, Inc., an entity he described as a "placement agent" that facilitates investment in the energy industry. The compliance officer initially agreed to provide the information to Wilkie but quickly reversed course without explanation. Wilkie sued to obtain the records.

Section 152.002 of the Texas Business Organizations Code governing partnerships provides:

(a) Except as provided by Subsection (b), a partnership agreement governs the relations of the partners and between the partners and the partnership. To the extent that the partnership agreement does not otherwise provide, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.

(b) A partnership agreement or the partners may not:

(1) unreasonably restrict a partner's or former partner's right of access to books and records under Section 152.212;

....

Id. at *2 (quoting TEX. BUS. ORG. CODE ANN. § 152.002(a), (b)(1)). Section 152.212 requires a partnership to maintain books and records and to give its partners (and their agents and attorneys) access to the records, including the opportunity to inspect and copy them during normal business hours. Tex. Bus. Org. Code Ann. §152.212.

The trial court granted Wilkie’s traditional summary judgment motion, ordered defendants to give him names and contact information for the partners, and awarded him nearly \$10,000 in attorney’s fees. Defendants appealed, arguing that (1) Wilkie’s motion for summary judgment did not address or provide evidence showing the refusal was unreasonable; and (2) defendants were prohibited from providing the information by a non-transferability provision in the partnership agreements. The non-transferability provision states:

Transferability of the units is restricted. The units may not be resold in the absence of an effective registration statement under the act, or an opinion of counsel acceptable to the managing partner that such registration is not required. Further, resale of the units may result in significant adverse tax consequences to the partners, and accordingly, units are being offered only to a limited number of persons who satisfy the suitability requirements specified in the memorandum. See “investor suitability standards.”

The Court of Appeals quickly dispensed with the unreasonableness argument, noting that Wilkie’s motion expressly cited the statutory standard and attached an affidavit supporting the allegations. As to the non-transferability provision, it concluded that the plain language did not support the refusal to provide Wilkie access and did not address the accessibility of records. *Id.* at *3. As to attorney’s fees, the defendants argued on appeal that plaintiff failed to request them under the appropriate statute, but they failed to preserve the argument in the trial court so the Court of Appeals affirmed the trial court’s judgment on all issues.

2. *Coe v. DNOW LP*, __ S.W.3d __, 2025 WL 1759382 (Tex. App. - Houston [14th Dist.] June 26, 2025) (Christopher, C.J.)

The Fourteenth Court of Appeals reversed a jury trial verdict for plaintiffs in a misappropriation of trade secrets case between competitors. In a matter of first impression, the Court ruled that plaintiffs’ common law trade-secret-misappropriation claim was preempted by the Texas Uniform Trade Secrets Act (TUTSA) and plaintiff’s breach of fiduciary duty claim was partially preempted by TUTSA. It also ruled the district court’s instruction on the breach-of-fiduciary-duty claim was erroneous and not harmless error.

The Eoff family founded Odessa Pumps and sold the company to plaintiff DNOW in 2015. Toby Eoff continued to work for Odessa Pumps as vice president after the sale, but in January 2022, he announced his retirement. Brian Madison, a branch manager at Odessa Pumps, then contacted Clayton Kenworthy, a former Odessa Pumps employee who owned Permian Pump & Valve, about leaving Odessa Pumps to join Permian and expand Permian’s business to compete with Odessa Pumps/DNOW. Madison indicated that five employees were ready to leave with him. Ultimately, nearly 30 Odessa Pumps employees left and joined Permian.

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Before he left, Madison talked with other employees about leaving and passed information to Kenworthy about employee compensation, commissions, and accrued vacation time. He also copied his hard drive and took those files with him to Permian. Another employee, Bo Young, sent copies of his working files to his personal email, including 645 proprietary drawings and every manager's report in his possession dating back to October 2015. A regional manager, Michael Wheeler, recruited other Odessa Pumps employees to leave and lied under oath when he denied copying Odessa Pumps' files. At trial, plaintiff DNOW characterized the collection of copied files taken to Permian as enough to fill 32 boxes.

After the departures, DNOW sued Permian, Kenworthy, and many of the former employees for violations of TUTSA and the Texas Theft Liability Act. DNOW settled with Permian and Kenworthy before trial and went to trial against the former employees. DNOW also amended its petition to add breach of fiduciary duty claims against Eoff, Madison, Wheeler, and Odessa Pumps' sales director, Russell Dauphin. The jury found for the plaintiffs on all claims and awarded identical actual damages under TUTSA and the Texas Theft Liability Act. The jury also assessed exemplary damages against the individual defendants in varying amounts for trade-secret misappropriation but not for theft liability. The trial court then rendered judgment for plaintiff DNOW on its claims of conspiracy to misappropriate trade secrets and its breach of fiduciary duty claim against the four individual defendants. The defendants appealed.

Preemption of Common Law Trade Secret Misappropriation and Conspiracy Claims

In a matter of first impression for the Fourteenth Court of Appeals, the Court ruled that TUTSA preempted the plaintiff's common law trade-secret-misappropriation claims, including conspiracy to misappropriate trade secrets. DNOW argued against preemption on grounds that the elements of the two claims were different, but the Court rejected that argument. It concluded that the "compare-the-facts" or "same conduct" test employed by the majority of courts was more consistent with the Act's language and with Texas law. Accordingly, the Court held that plaintiffs' civil conspiracy claim was preempted.

The Court declined to rule on whether TUTSA preempted the plaintiff's Theft Liability Act claims but ruled there was insufficient evidence to support them. Because no defendant could be held liable on this claim, the defendants were the "prevailing party" under the Texas Theft Liability Act and the court awarded appellate fees to defendants on the Texas Theft Liability Act claims.

Insufficiency of Damages and Causation Evidence

The jury found the settling parties were responsible for 95% of DNOW's actual losses and that individual defendant Young was responsible for the remaining 5% for misappropriation of trade secrets under TUTSA. However, DNOW's damages expert did not distinguish between damages caused by misappropriation of trade secrets and damages caused by misappropriation of confidential information that was not a trade secret. Nor did she identify any defendant who misappropriated a particular trade secret and used that trade secret to recruit another employee. She simply assumed the damages were caused by the "collective actions of the Defendants." In addition, while the expert opined that replacing employees entailed three costs (recruitment, retraining, and lost productivity), no evidence was presented about the cost of retraining and the jury was not asked to assess damages based on recruitment costs. The expert's evidence on lost productivity was conclusory and estimated it would take them a couple of months to get up to speed.

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The court did find two categories of damages were supported by legally sufficient evidence: DNOW's payment of retention bonuses to employees who remained and the jury's finding that Young was 5% responsible for DNOW's trade-secret-misappropriation damages. The Court remanded the issue of attorney's fees because DNOW's damages after appeal were less than 1% of the total damages originally assessed and DNOW was no longer the prevailing party against 12 of the 13 appellants. As for exemplary damages, the Court capped them at \$22,500, which was twice the amount of the compensatory damages for which defendant Young was held liable.

Breach of Fiduciary Duty Claims

The jury found that Eoff, Madison, Wheeler and Dauphin all owed fiduciary duties to Odessa Pumps/DNOW. In compensation for their breaches of fiduciary duty, the jury awarded DNOW the full amount of compensation Odessa Pumps paid each of them in 2022.

Defendants first argued that the breach of fiduciary claims were preempted by TUTSA whether they were based on misappropriation of trade secrets or misappropriation of confidential information. The appellate court disagreed, ruling that fiduciary duty claims based on misappropriation of trade secrets were preempted, "the jury could find a breach of fiduciary duty on grounds other than misappropriation of trade secrets."

Defendants next argued that forfeiture of their compensation was an improper remedy for breach of fiduciary duty because (1) DNOW was required to obtain findings that a fiduciary profited from the breach and (2) the Texas Labor Code prohibits the withholding or diversion of wages unless the employer is ordered to do so by a court of competent jurisdiction. The Court rejected both arguments, ruling that equitable remedies such as forfeiture are intended to protect relationships of trust, and the labor code provisions did not address the forfeiture of wages already paid.

Defendants also challenged the jury charge that was based on a model charge for the duties owed by a fiduciary to a beneficiary in a particular transaction. The Court ruled the charge was not an accurate statement of the law applicable to this case. The court should have instructed the jury that while an employee may plan to compete and take certain steps toward that goal, including joining with other employees, without disclosing his plans to his employer, he may not "solicit" the departure of other employees during his term of employment. *Id.* at *22. The proposed charge submitted by defendants was consistent with the law.

The Court then proceeded to evaluate the sufficiency of the evidence against each of the four defendants charged with breach of fiduciary duty. It ruled that the evidence against three of the four was legally sufficient even under a correct charge. It noted that the jury could have concluded that Eoff breached his fiduciary duty by actively advising another company about the employment terms to offer DNOW employees, and the jury could have concluded that Wheeler and Madison breached their fiduciary duties and DNOW's code of conduct when they gathered information needed by Permian to obtain a Master Services Agreement with one of DNOW's customers. Finally, the jury could have concluded that Dauphin breached his fiduciary duty to DNOW when he accepted a job offer from Permian with a 6% equity stake, then agreed to a strategy whereby Permian would hire Odessa Pumps' best employees and try to sell Permian to DNOW for a profit.

Despite this analysis, the Court reversed the trial court's fiduciary duty awards because "[t]he charge permitted the jury to find breach of fiduciary duty on legally invalid bases, such as the

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preempted ground that the fiduciary appellants misappropriated trade secrets, planned to compete with DNOW after resigning, or failed to disclose the plans of themselves or others to work for or invest in Permian in the future. On this record we cannot be reasonably certain that the jury was not significantly influenced by the error.” *Id.* at *25. It remanded those claims for a new trial.

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