FLETCHER | HELD

Main Number: 713-255-0422
Email: sfletcher@fletcherheld.com
Email: kheld@fletcherheld.com

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:

- Fifth Circuit Ruling - In *National Association of Private Fund Managers v. SEC* , the Fifth Circuit rejected a challenge to the SEC's Securities Lending Rule and Short Sale Rule under the Administrative Procedures Act. While the Court did not vacate the rules, it remanded them to the SEC for further analysis of their collective economic impact because they were highly related and adopted at the same SEC meeting.

- Federal District Court Rulings – In securities class actions, federal district courts dismissed §§ 11 and 12 claims in two cases and denied motions to dismiss § 10(b) claims in three cases. In *Targgart*, the court ruled plaintiffs lacked standing to sue because they obtained their shares in an equity distribution after a spinoff rather than "acquiring" them in an exchange of value. In *agilon health*, the court dismissed Securities Act claims because the alleged misstatements in the offering documents were accurate, mere puffery, or accompanied by appropriate warnings, but it allowed § 10(b) claims based on post-IPO misstatements to go forward. In *Microvast Holdings* and *Globe Life Insurance*, the courts refused to dismiss § 10(b) claims.

  In two other cases, federal district courts grappled with the *Howey* test for "investment contracts." In *Ask America*, the court ruled that an agreement to buy and hold securities for a certain period was not an "investment of money in a common enterprise" (the Texas Securities Act equivalent of the *Howey* test). In *Cryptozoo*, the magistrate judge recommended that NFTs and cryptocurrency tokens qualified as securities, applying factors from the SDNY's *Coinbase* decision rather than the *Howey* test.

  In other federal cases, courts addressed whistleblower retaliation claims, statutes of limitations and repose, the Supreme Court's *Winter* factors now applicable to SEC requests for injunctive relief, and other issues.

- State Court Rulings – In *Reed v. Rook*, the Texas Business Court addressed a dispute over lottery winnings, first ruling that it had jurisdiction over a third party's interpretation of governance documents, then remanding the case after the plaintiff amended and eliminated certain claims. In *Riverside*, it dismissed claims on limitations grounds because the private equity investor in a healthcare entity was on inquiry notice of corporate fraud more than four years before the case was filed. In *Kay v. Yosowitz*, Houston's 14th Court of Appeals reversed a $54 million breach of fiduciary duty award because there was insufficient evidence and plaintiff's expert improperly assumed that all the profits of a separate business were attributable to the breach. In *Triple G Ventures*, Houston's 1st Court of Appeals dismissed fraud and fiduciary

duty claims for lack of personal jurisdiction, ruling that the sale of securities to Texas residents was the fortuitous outflow of unrelated communications, not a purposeful effort to sell securities in Texas.

CASE SUMMARIES

I. FEDERAL CASES

A. Fifth Circuit

1. *National Ass'n of Private Fund Managers v. SEC*, 151 F.4th 252 (5th Cir. 2025) (Wilson, J.)

Key Takeaway: *When the SEC adopts highly interrelated rules in the same meeting, it must consider the collective economic impact of the rules on each other.*

Three organizations of institutional investment managers challenged two related SEC rules that were adopted on the same day: (1) the Securities Lending Rule, Exch. Act Rule 10c-1a, and (2) the Short Sale Rule, Exch. Act Rule 13f-2. The plaintiffs claimed the two rules were irreconcilably contradictory in violation of the Administrative Procedure Act (APA) and exceeded the SEC's statutory rulemaking authority. The Fifth Circuit disagreed but ruled the SEC failed to analyze the cumulative economic impact of the two rules together when it finalized and adopted the Securities Lending Rule. Accordingly, the three-judge panel of Wilson, Douglas, and E.D. La. Judge Vitter did not vacate either rule but remanded to the SEC for further economic analysis.

Background

Securities lending and short sales are related. Securities lending involves the temporary transfer of securities from a lender to a borrower for a fee. Short sales occur when an investor borrows shares of stock from a lender, sells the shares at their current value, and hopes the stock declines in value so that he can repurchase the shares at a lower price and return them to the lender. In the wake of the financial crisis of 2008, Congress sought to increase transparency and passed the Dodd Frank Act, which includes two provisions relevant to this case. Section 984(b) authorized the SEC to promulgate rules that are designed to increase the transparency of lending and borrowing information available to brokers, dealers, and investors. Section 929X gave the SEC authority to require public disclosure of the aggregate amount of short sales of securities.

On November 8, 2021, the SEC proposed the Securities Lending Rule requiring securities loan transactions to be reported to FINRA within 15 minutes of execution and requiring publication of transaction-by-transaction data as soon as practicable thereafter. On February 25, 2022, the SEC proposed the Short Sale Rule, applicable to institutional investment managers, and requiring short sale data to be published monthly on EDGAR on an aggregate basis. Both rules went through a public comment period, with the time for comments on the Securities Lending Rule extended so that commenters could consider any effects on it from the Short Sale Rule.

On October 13, 2023, the SEC adopted the final versions of the two rules. While the Short Sale Rule did not materially change, the Securities Lending Rule did. The time period for initial reporting of securities lending transactions was changed from 15 minutes until the end of the day, and

the size of each individual loan did not have to be reported until 20 days after the transaction was completed.

Claims and Analysis

The petitioners claimed (1) the Securities Lending Rule and the Short Sale Rule were irreconcilably contradictory in violation of the APA because the Securities Lending Rule would reveal the very information the Short Sale Rule sought to protect (i.e., the details of specific short sales rather than aggregate data); (2) the Securities Lending Rule exceeded the SEC's statutory authority, (3) the Short Sale Rule required disclosure on EDGAR rather than on the less burdensome FINRA system, (4) the Short Sale Rule impermissibly applied to extraterritorial transactions, and (5) the SEC failed to consider the Rules' collective economic impact on each other.

The Court began by outlining its role in evaluating the Commission's regulatory actions:

> Under the APA, this court must uphold the Commission's action unless it is in "excess of statutory jurisdiction, authority, or limitations," or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."
>
> Arbitrary-and-capricious review requires this court to scrutinize the record to determine whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection' between the facts found and the choice made.'"
>
> In addition to adhering to the APA's requirements, the Commission has a "unique obligation" to comply with the considerations enumerated in the Exchange Act when promulgating rules. Specifically, the Commission must consider the effect of a new rule upon "efficiency, competition, and capital formation." And "its failure to 'apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious and not in accordance with law."

Id. at 260-61 (citations omitted).

Turning to the Securities Lending Rule, the Court rejected plaintiff's suggestion that § 929X (addressing Short Sales) somehow limited the SEC's authority under § 984(b) (addressing Securities Lending). Securities lending was not just a proxy for short sales (as detailed below), and the Plaintiff's reading of the statute would render § 984(b) mere surplusage. Moreover, even assuming § 929X cabined the SEC's authority to regulate securities lending disclosures, the SEC did not exceed its authority by requiring disclosure of securities lending data more frequently than every month. *Id.* at 263 ("§ 929X expressly sets a *minimum* disclosure frequency, not a maximum.").

Addressing the Short Sale Rule, the Court noted that the SEC's decision to require reporting on EDGAR rather than on the FINRA system was explained in the final rule and the evidence showed that it "reasonably considered the relevant issues and reasonably explained the decision." *Id.* at 265. The Court further noted that both the proposed and final versions of the Short Sale Rule covered only equity securities "already subject to Regulation SHO," which does not include securities traded outside the United States.

Looking at both rules in tandem, the Court rejected the plaintiff's argument that the two rules were irreconcilably contradictory. While the SEC acknowledged a correlation between short sales and securities lending, the data showed they were not direct proxies for each other. Securities loans may be used to hedge, close positions, and obtain collateral – not just for short sales. In addition, the data reported under each rule is distinct. Moreover, the SEC considered arguments against the proposed rules and expressly justified the reporting it required in the final rule. Indeed, it modified the final Securities Lending Rule by delaying transaction-by-transaction loan size data by twenty business days which, coupled with the addition of "aggregate transaction activity" should help reduce the potential to anticipate and reverse engineer the trading of competitors. *Id.* at 268-69. Even though delayed loan-size data could provide some novel information about short sellers' strategies, the delayed disclosure would significantly reduce the novelty of the information.

Finally, the Court addressed plaintiffs' argument that the SEC failed to consider the Rules' collective economic impact as required. While the SEC discussed the first-adopted Securities Lending Rule in its economic impact analysis of the Short Sale Rule, it did not consider the interplay of the Short Sale Rule in its economic impact analysis of the Securities Lending Rule. The SEC argued this was not required or practical since the Securities Lending Rule was adopted first and it was not then known whether the Short Sale Rule would be adopted, but the Court quickly rejected that position. "[I]n the context of highly interrelated Rules enacted contemporaneously during the same open meeting, the Commission's approach was a short-cutting fiction that does not survive scrutiny." *Id.* at 270. "Given the close temporal proximity of the Rules' adoption and their interrelatedness, the Commission was thus not free to ignore the impact of the Short Sale Rule upon the Securities Lending Rule; the agency needed to consider the Rules' collective economic effects." *Id.*

To ensure this one-time ruling was not misunderstood, the Court added: "We hasten to emphasize the limited nature of our holding: We express no general view on when or how cumulative economic impact analyses should be conducted in other cases involving multiple proposed rules with potentially overlapping economic implications. To the contrary, we accept *arguendo* that in the mine's run of cases, a rule's economic baseline need not include subsequently proposed rules because such draft regulations may never be adopted." *Id.* at 273.

In accordance with its limited ruling, the Court did not vacate either of the Rules but remanded to allow the SEC to analyze their cumulative economic impact and respond to further comments in view of that analysis. *Id.*

B. Federal District Courts

1. *Targgart v. Next Bridge Hydrocarbons, Inc.*, __ F.Supp.3d __, 2025 WL 1831590 (N.D. Tex. July 3, 2025) (Pittman, J.)

Key Takeaway: *Plaintiffs who do not exchange anything of value to obtain securities are not authorized to bring claims under §§ 11 and 12 of the Securities Act.*

Judge Pittman dismissed a putative securities fraud class action under Section 11, 12, and 15 of the Securities Act because the plaintiffs lacked standing to bring their claims under the Act. Such claims are limited to those who "acquire" their shares in a transaction where something of value is exchanged for securities issued pursuant to a registration statement or a prospectus. In this action, the

plaintiffs did not exchange anything of value for their shares. They obtained them as a distribution of equity from another company that was spinning off assets into a new entity.

Torchlight Energy Resources, Inc. owned substantial oil and gas interests in West Texas but needed access to market capital. In 2020, Torchlight opened negotiations with Metamaterial Technologies, Inc. about a reverse merger. Under the terms of the merger, Torchlight shareholders would receive a dividend of non-voting preferred shares in the new entity (Meta II) that corresponded to Torchlight's oil and gas assets. These preferred shareholders then had the right to receive proceeds if the assets were sold, but if the assets were not sold by a certain date, they would be spun off into a new entity (Next Bridge). When that happened, the preferred shareholders would keep their shares in Meta II and receive shares in Next Bridge as a distribution of equity from Meta II.

Meta II did not sell the assets by the set date so its leadership proceeded to spin-off the assets to Next Bridge. In July 2022, Next Bridge filed a registration statement on Form S-1 that valued the assets at $47.9 million. In December 2022, the spin-off was completed, and the Meta II preferred shareholders received their shares in Next Bridge as an equity distribution. Torchlight's CEO, John Brda, played a key role in the entire process, identifying and recruiting Metamaterial as a merger partner; promoting the plan in investor meetings, on social media, and in press releases; promoting Meta II and Next Bridge; and saying at one point that the preferred shareholders owned 3.2 billion barrels of oil.

In March 2023, Next Bridge filed its 2022 10-K and listed the value of its assets as $79.6 million, but four months later it restated their value as zero. Plaintiffs promptly filed a securities fraud class action under the Securities Act on behalf of those who acquired shares in Next Bridge. Plaintiffs sued (1) Next Bridge and nine individuals, including CEO Brda, for violating Section 11 (misstatements/omissions in the registration statement); (2) Next Bridge and Brda for violating Section 12(a)(2 (misleading prospectus and related statements)); and (3) a subset of the individuals for violations of Section 15 (control person liability). The case was initially filed in the Eastern District of New York but was later transferred to the Northern District of Texas. All defendants filed motions to dismiss.

Section 11

Defendants challenged Plaintiffs' standing to sue under Section 11, which is limited to those who "acquire" a security. Defendants argued Plaintiffs did not meet the definition of "acquire" because they did not purchase any shares in Next Bridge and simply received their shares as a distribution of equity. The Court first noted that no caselaw defined the term "acquire" with any specificity. It then considered whether an expansive reading of the term was consistent with cases that give Section 11 standing to aftermarket purchasers in an IPO so long as they can trace their shares to the challenged registration statement. *Id.* at *3 (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871-73 (5th Cir. 2003)). But it rejected that view, noting that in both aftermarket sales and stock-for-stock mergers, the plaintiff gives something of value for the security issued under a challenged registration statement. *Id.* at *4.

In addition, while courts have looked to the definition of "sale" to determine who may sue under Section 11, the term sale is generally limited to direct purchases or stock-for-stock exchanges where something of value is given for the security. By contrast, the term "sale" does not seem to cover the transaction at issue here:

> Plaintiffs did not give value for their Next Bridge shares. Instead, they paid money for shares of Torchlight or Meta II and later became entitled to a distribution – not a purchase – of Next Bridge shares. In fact, the Registration Statement says so plainly: "We [Next Bridge] are . . . not asking you [Preferred Shareholder] to make any payment or surrender or exchange any of your shares of Meta [II] common stock for shares of our common stock."

Id. The Court further noted: "It is not that Plaintiffs were wronged under the statute but suffered no damages; it is that the statute simply does not apply to them." *Id.* In this sense, they lack standing because they are not authorized under the statute, not because their case does not satisfy the requirements of Article III. Since Plaintiffs did not claim they purchased shares of Next Bridge, but only that Next Bridge shares were distributed to them by Meta II, they failed to state a claim under Section 11.

Section 12(a)(2)

Plaintiffs' Section 12 claim failed for the same reason as their Section 11 claim. In addition, they failed to allege they purchased their shares in a public, rather than an aftermarket, transaction. *Id.* at *5 (citing *Dartley v. ErgoBilt, Inc.*, 2001 WL 313964, at *2 (N.D. Tex. Mar. 29, 2001) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). Finally, the alleged misrepresentations made by CEO Brda invited the public to buy shares in Torchlight and Meta II, not Next Bridge. Defendants tried to portray the alleged misstatements as "promoting Next Bridge" but the Court rejected that characterization: "[C]alling it that does not make it so." *Id.* at *6.

Section 15

Because Plaintiffs failed to state a claim under Sections 11 or 12, they failed to state a claim under Section 15. *Id.* at *6 (citing *Lone Star Ladies Inv. Club v. Schlotzsky's, Inc.*, 238 F.3d 363, 370 n.33 (5th Cir. 2001) (Section 15 liability derivative of Section 11 and 12 liability)).

2. *In re agilon health, inc. Secs. Litig.*, 2025 WL 2388183 (W.D. Tex. Aug. 15, 2025) (Ezra, J.)

Key Takeaway: *Private equity firms may face insider trading claims if they sell stock when they have access to material non-public information.*

In this putative securities class action, Judge Ezra granted motions to dismiss § 11 claims against all defendants for alleged misstatements in the Company's 2021 IPO offering documents. However, the Court allowed §10 (b) claims against the Company and its officers to go forward based on alleged post-IPO misrepresentations and omissions. The Court also denied a motion to dismiss control person liability claims against the Company's private-equity owner for the period when it owned more than 25% of the Company and designated a majority of directors on the Board. Significantly, for private equity firms that sell stock when their portfolio companies go public, the Court also allowed insider trading claims against the private equity defendants to go forward because they had access to material, non-public information through a stockholder's agreement and sold $2 billion in stock during a period when the Company allegedly learned but did not disclose adverse facts about its business.

Factual and Procedural Background

agilon was formed in July 2016 by CD&R, a New York-based private equity firm. The Company acts as a middleman between Medicare Advantage health plans (payors) that cover senior citizens and the federal government's Center for Medicare and Medicaid Services (CMS). In exchange for a percentage of the CMS fees that payors receive, agilon agrees to accept 100% of the financial risk of payors' medical costs. To do so, it enters into multi-decade agreements with physician practice groups in the payors' areas. During its 2021 IPO and afterwards, agilon touted its differentiated, full-risk business model as one that empowered physicians to be the agents of change and that significantly improved the quality of care and reduced costs.

According to the complaint, COVID-19 temporarily suppressed medical procedures and buoyed agilon's financial results. After the country reopened, patient utilization remained suppressed, further boosting agilon's bottom line. This led agilon's owner, CD&R, to orchestrate a public offering of its shares that raised $1.2 billion and allowed insiders (including CD&R) to sell billions of dollars in shares after the IPO. However, in November 2023, agilon cut its FY23 outlook, revealing a deterioration in its key profit metrics and an undisclosed spike in patient utilization beginning around May 2023. Its stock price declined 13%. In January 2024, agilon lowered its FY23 outlook again, and its CFO resigned unexpectedly. Its stock price dropped another 29%. By February 2024, agilon disclosed that it had missed its revised FY23 forecast, and its stock price dropped another 7%. All told, during the proposed class period of April 15, 2021 to February 27, 2024, agilon's stock price dropped from a high of $44 per share to less than $6.50 per share.

Plaintiffs challenged three statements made in the public offering documents (§11 claim) and six statements made after the IPO (§10 (b) claims). Plaintiffs also sued the private equity owner of agilon for control person liability and insider trading. All defendants moved to dismiss.

Securities Act (§11) Claims

Plaintiffs challenged three statements made in agilon's public offering documents concerning the Company's (1) business model; (2) visibility into its financial trajectory; and (3) data integration and management. Defendants first argued the claims should be dismissed because they challenged the same statements alleged to be fraudulent after the IPO but failed to plead with particularity as required under FRCP 9(b). Plaintiffs responded that the complaint only alleged the post-IPO statements were fraudulent and contained a statement expressly disavowing any claim of fraud with respect to the IPO statements. The Court agreed with the plaintiffs. It noted that while a boilerplate disclaimer of fraud was not sufficient by itself, the complaint made no reference to fraud or scienter in its §11 claims: "[T]he Plaintiffs have separately parsed out their fraud allegations in support of their Exchange Act claims from the allegations in the Securities Act claims." *Id.* at *6.

Defendants next argued the statements were not materially false or misleading when made because they were accurate, mere puffery, or accompanied by appropriate warnings. The Court agreed. The statements distinguishing agilon's value-based care model from traditional "fee-for-services medicine" were not materially misleading and were "generalized, positive statements of optimism" that were not actionable. The statements about agilon's visibility into the financial trajectory of medical costs was accompanied by warnings cautioning investors that it relied on estimates, that the estimates could be impacted by COVID-19, and that a reasonable investor would have recognized the estimates were speculative and uncertain. The statement about agilon's data integration and management

similarly contained warnings that the data was based on payor information and might be inaccurate. Plaintiffs also cited a May 2024 letter to CMS from some physician partners complaining that the data they received from agilon was delayed, altered, and insufficient for them to manage patient costs effectively. The Court found, however, that the letter, which was sent more than three years after the IPO, did not suggest the IPO statements were inaccurate when made and repeated the same warnings disclosed in the IPO.

The Court dismissed the Securities Act claims.

Exchange Act (§10 (b)) Claims

Plaintiffs also challenged six post-IPO statements made during the class period concerning the Company's (1) medical margin guidance and the bases for its financial projections; (2) business model; (3) data integration; (4) growth strategy; (5) healthcare utilization trends; and (6) reported financial results. Defendants argued these statements were not false or materially misleading, they were accompanied by appropriate warnings, and some were inactionable opinions. In a detailed analysis of each alleged misstatement, the Court concluded that four categories were sufficiently alleged, but dismissed the allegations based on data management and agilon's growth strategy.

As to the four categories that were sufficiently alleged, the Court then considered whether the complaint alleged facts giving rise to a strong inference of scienter. Plaintiffs argued that executive stock sales and the private equity owner's stock sales established a motive for the misstatements. The Court found the stock sales by the Company's executives were not suspicious, but the timing and amount of sales by the private equity owner were suspicious and this motive could be imputed to the Company. *Id.* at *25. The Court also found that the alleged misstatements and omissions related to core issues of agilon's business (medical margin and adjusted EBITDA) and contributed to the defendants' scienter. While neither stock sales nor core operations allegations were sufficient on their own to raise a strong inference of scienter, the Court ruled that collectively they were sufficient to raise a strong inference. *Id.* at *27.

Claims Against Private Equity Owner

Plaintiffs alleged that agilon's private equity owner, CD&R entities and individuals, were liable as control persons under Securities Act § 15 and Exchange Act § 20 and for insider trading under Exchange Act § 20A. The CD&R Defendants denied these allegations and argued that only one of them, an entity named CD&R Vector Holdings, L.P. (Vector), even owned agilon stock. While Vector owned 58% of the stock at the time of the IPO, it gradually reduced its holdings to less than 50% in August 2022 and less than 25% in May 2023 when three CD&R-designated directors also resigned from the Board.

Based on its ruling that there were no materially misleading statements in the IPO offering documents, the Court dismissed the control person liability claims against the CD&R Defendants under § 15 of the Securities Act. However, it refused to dismiss control person liability claims against the CD&R Defendants under § 20 of the Exchange Act for statements made prior to May 2023. The Court reasoned that until May 2023, Vector owned more than 25% of agilon's stock and the CD&R Defendants collectively designated five of nine seats on agilon's board, and this was sufficient to allege control.

With respect to insider trading allegations under §20A, the Court found the complaint adequately alleged the CD&R Defendants had access to agilon's non-public information pursuant to the terms of a stockholder's agreement. Given this access to inside information, the Court found the May 18, 2023 sale of more than $2 billion in stock was suspicious in timing and amount. Because Plaintiffs alleged that agilon concealed a spike in patient utilization of medical services in May 2023, this information was material at the time of CD&R's $2 billion stock sale.

3. *Schelling v. Microvast Holdings, Inc.*, __ F.Supp.3d __, 2025 WL 2430613 (S.D. Tex. Aug. 22, 2025) (Hanen, J.)

Key Takeaway: *Under a rarely used exception to the "group pleading" rule, dramatic corporate statements that would have been approved by upper management may avoid dismissal.*

Judge Hanen mainly denied defendants' motion to dismiss a putative class action against defendant Microvast Holdings, Inc. and five of its officers. Plaintiffs alleged that defendants made material misstatements and omissions about (1) a $200 million grant from the Department of Energy (DOE) and (2) the Company's progress in constructing and obtaining equipment for a new battery-manufacturing plant in Clarksville, TN. The Court concluded that all but one statement and portions of two others adequately alleged securities fraud. Notably, as to statements about the $200 million DOE grant, the Court excused plaintiff's group pleading based on an exception for dramatic announcements that would have been approved by upper management.

Microvast makes batteries for electric vehicles. While its principal place of business is Stafford, Texas, the complaint alleged it conducts most of its business through a Chinese subsidiary that employs 95% of its 1800 employees. Sometime before 2021, Microvast announced plans to build a battery manufacturing plant in Clarksville, TN and a separator plant in Hopkinsville, KY.

In late 2021, Congress passed the Infrastructure Investment and Jobs Act to promote green energy products in the United States. In May 2022, the DOE announced that it was going to offer grants totaling $3.1 billion for new electric car battery manufacturers to reduce dependence on foreign battery manufacturers, primarily China. The application process was open to domestic manufacturers, but applicants were required to disclose any involvement of foreign participants.

Microvast decided to apply for a grant of $200 million to offset the cost of its $500 million separator plant in Hopkinsville. The complaint alleged that Microvast's DOE application downplayed its financial and political ties with China and failed to reveal that all its manufacturing capacity and nearly all its 1800 employees were in China. Moreover, on October 19, 2022, Microvast announced that it had *received* a $200 million grant from DOE when, in fact, it had only been selected to *negotiate* for a grant. Microvast continued to claim it had received a grant until May 22, 2023, when the DOE announced that it had terminated grant negotiations with the Company.

Alleged Misstatements About TN Facility Construction Progress

Once the DOE terminated negotiations, Microvast abandoned the Hopkinsville project, but it continued with the construction of the Clarksville, TN battery-manufacturing plant. The first phase called for the build-out of a two GWh production line. The Company claimed its products were already pre-sold and there was a backlog of demand. It also claimed the facility was self-funded due to Inflation Reduction Act credits.

The complaint further alleged that Microvast misrepresented its progress on the Clarksville facility, including Microvast's (1) March 2023 statement that 65-75% of the equipment for the facility was ready to be tested and shipped and (2) November 2023 statement that 30% of the equipment was on site with the majority of remaining equipment already shipped. In fact, the equipment manufacturer had pushed the delivery date to April or May 2023, none of the equipment passed factory acceptance testing by May 2023, and none of the equipment had been shipped by August 2023. In addition, Plaintiffs also alleged two other statements were false: Microvast's (1) August 2023 statement that the Clarksville facility was "on track" to begin production in Q423 and (2) November 2023 statement that the building was jointly occupied and only minor work remained to be done. In fact, the facility lacked electricity and flooring in June or July 2023; had no power and only 40-50% of its clean rooms were complete by August 2023 when it stopped paying certain contractors and vendors; and was "just a shell" when contractors and subcontractors demobilized in December 2023 or January 2024.

DOE Grant

Plaintiffs alleged that defendants made five material misstatements/omissions about the DOE grant that were misleading because (1) Microvast claimed it was a recipient of a DOE grant when it was only selected to negotiate one; (2) it failed to disclose the risk the grant would fall through because of its extensive Chinese connections; and (3) it failed to disclose the risk the grant would fall through because the Company misled the DOE about the extent of its Chinese connections. Defendants countered that the statements were not false because the conditional nature of the grant selection was known to the public and disclosed on the DOE website and in Microvast's 2022 10-K. The Court rejected this argument, noting that the disclaimers were in "wholly different and separate documents" and did not affect the veracity or falsity of the alleged misstatements by Microvast. In addition, the disclaimers Microvast included with the statements downplayed the significance of the DOE negotiations and overstated the likelihood they would be successful by suggesting only specific terms were left to be resolved. The Court did not address the plaintiff's argument that the Company's statements omitted material information.

As for materiality, the Court acknowledged that the information contained on the DOE's website and the Company's 10-Q were part of the "total mix" of information that might have been considered important by a reasonable investor. But the Court nevertheless found the misstatements material because Defendants "have the burden of demonstrating the 'corrective information [was] conveyed to the public with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements.'" *Id.* at *12 (quoting *In re MBIA, Inc. Sec. Litig.*, 700 F.Supp.2d 566, 581 (S.D.N.Y. 2010) (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000)).

As to scienter, defendants argued that the complaint failed because of group pleading that failed to tie specific misstatements to specific individuals. The Court disagreed, citing an exception to group pleading prohibition from the *B.P. p.l.c.* and *Tellabs II* decisions:

> Suppose General Motors announced that it had sold one million SUVs in 2006, and the actual number was zero. There would be a strong inference of corporate scienter, since so dramatic an announcement would have been approved by corporate officials sufficiently knowledgeable about the company to know that the a[nn]ouc[]ment was false. . . . . [In such a case,] it is possible to draw a strong inference of corporate scienter without being able to name the individuals who concocted and disseminated the fraud.

> . . . The critical question, therefore, is how likely is it that the allegedly false statements . . . were the result of merely careless mistakes at the management level based on false information fed it from below, rather than of an intent to deceive or a reckless indifference to whether the statements were misleading.

Id. at *14 (citing *In re B.P. p.l.c.*, 843 F.Supp.2d at 789 and *Tellabs II*, 513 F.3d at 709-10). Applying this exception, the Court concluded: "Given the crucial nature and substantial sum of the funding [$200 million, or the amount of an entire year's revenue], far from the information being fed from below, it was much more likely that executive management had a direct hand in the process." *Id.*

Clarksville Progress

Plaintiffs relied heavily on three former employees for their claim that the defendants misrepresented the progress on the Clarksville facility: a Maintenance Supervisor who worked in Clarksville, a Buyer for the facility; and a Maintenance Manager at the facility. Based on the particularized allegations about their roles, the Court concluded they were in a position to know first-hand if the Company's statements were accurate so it accepted their factual statements as true.

The Court ruled that each of the eight alleged misstatements about Clarksville were false but portions of two were immaterial corporate puffery ("racing to get there", "in the race", and "hard yards have been done"). It then evaluated the scienter of each defendant, ruling that the allegations raised a strong inference for all but one of the alleged misstatements based on the individual defendants' awareness of adverse facts, being privy to regular reports about the project's progress, and the "core operations" theory. It similarly rejected defendants' argument that the mixed present/future statements were protected by the safe harbor.

4. *City of Miami Gen. Employees' & Sanitation Employees' Ret. Trust v. Globe Life Ins.*, 2025 WL 2793800 (E.D. Tex. Sept. 29, 2025) (Mazzant, J.)

Key Takeaway: *Not every securities litigation decision is lengthy.*

In a five-page opinion, Judge Mazzant denied defendants' motion to dismiss a putative securities fraud class action against Globe Life Inc. and individual members of its executive committee. Plaintiff alleged that sales agents of Globe Life's subsidiaries, including American Income Life Insurance Company (AIL), carried out fraudulent practices to deceptively acquire business, which artificially inflated key metrics the Company reported to investors. Plaintiff also alleged that defendants made materially false and misleading statements about Globe Life's and AIL's sales, premium revenue, pyramid structure, Code of Conduct, and workplace environment.

Defendants moved to dismiss the complaint for inappropriate reliance on a third-party short seller report from Fuzzy Panda Research and the complaint's failure to allege falsity, a strong inference of scienter, loss causation, a scheme claim, and control person liability. Plaintiffs responded that the complaint met all pleading requirements and that their allegations were not based solely on the short-seller report but also their personal knowledge and investigation of counsel. The Court denied the motion with no detailed reasoning other than the following sentence: "After reviewing Plaintiffs'

complaint and the arguments presented in the briefs, the Court finds that Plaintiffs have stated plausible claims for relief under the standards set forth in Rule 12(b)(6), Rule 9(b), and the PSLRA." *Id.* at *5.

5. *In re Cassava Sciences, Inc. Secs. Lit.*, 2025 WL 2327101 (W.D. Tex. Aug. 12, 2025) (Ezra, J.)

Key Takeaway: *Challenging typicality in a securities fraud class action requires more than alleging plaintiffs were "day traders" who bought and sold a "meme stock."*

Judge Ezra granted plaintiffs' renewed motion for class certification in this § 10(b) securities fraud case against a company developing a drug to treat Alzheimer's disease.[1] The Court certified a class of purchasers of Cassava common stock (including those who acquired shares through put or call options) during the period September 14, 2020 and October 12, 2023. The Court reviewed each of the requirements for class certification, but the dispute between the parties centered on whether the named plaintiffs were typical of the proposed class members and whether Cassava was a "meme stock" that did not trade in an efficient market (and, therefore, did not qualify for the *Basic* presumption of reliance).

To qualify as a class action, Rule 23(a) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). Defendants argued the three named plaintiffs did not purchase Cassava securities in reliance on defendants' representations but were "meme stock trader[s]" who placed reckless, short-term bets hoping to profit off Cassava's volatility. Defendants also argued that the named plaintiffs' damages claims were atypical of the class because they stemmed from (1) a stock drop not associated with any alleged misrepresentations, (2) a broker's liquidation of the plaintiff's position at an inopportune time, and/or (3) a risky options bet. In sum, defendants claimed plaintiffs' trading patterns raised individualized questions about why they made their investments and whether they could show negative loss causation.

Typicality

The Court quickly dispensed with defendants' typicality challenge. First, it had previously rejected the argument that plaintiffs' claims were atypical because they were "day traders" or "in and out" traders. *Id.* at *7 (citing *Feder v. Elec. Data Sys. Corp.* , 429 F.3d 125, 137 (5th Cir. 2005). Second, while the named plaintiffs' individual damages might be different, that difference did not make their claims atypical. *Id.* (citing *KB Partners I, L.P. v. Barbier*, 2013 WL 2443217, at *11 (W.D. Tex. June 4, 2013) (rejecting argument that plaintiff was atypical because he was forced to sell his shares due to a margin call). Finally, plaintiffs' purchase of shares after disclosure of the alleged fraud did not necessarily preclude typicality. *Id.* (citing *Feder*, 429 F.3d at 138).

[1] The Court previously denied defendants' motion to dismiss. For a summary of the factual allegations in the case, see FH 2Q23 Newsletter, at 10-13.

Efficient Market

Defendants also challenged plaintiffs' expert witness, Professor Stephen Feinstein, who opined Cassava stock traded in an efficient market because he did not consider whether it was a "meme" stock, *i.e.*, a stock subject to extraordinary volatility due to viral social media attention by retail investors, divorced from the value of the underlying company. Defendants argued that markets for meme stocks were inefficient because of the potential of social media to distort market dynamics and efficient price discovery mechanisms. Accordingly, the *Cammer/Krogman* factors typically applied to determine market efficiency were not applicable.

The Court found the meme stock argument to be "legally and factually inaccurate." *Id.* at *12. Defendants cited no Fifth Circuit cases to support the view that the *Cammer/Krogman* factors should not be applied to meme stocks and cited several district court cases from other circuits that expressly rejected this view. *Id.* In addition, defendants' expert, Dr. Rene Stulz, admitted he had no evidence that Cassava was a meme stock and was not offering an affirmative opinion that the market for Cassava stock was inefficient. And, finally, the Court noted that Professor Feinstein's expert reports did address the meme stock argument but rejected it.

6. *Hu v. Ask* America*, LLC*, 2025 WL 2211795 (N.D. Tex. Aug. 4, 2025) (Starr, J.)

Key Takeaway: *When a party merely agrees to buy and hold stock until a certain date, it is not an investment contract.*

In this litigation about a "three-page contract relating to an initial public offering gone sideways," Judge Starr partially granted and partially denied cross motions for summary judgment. The Court granted summary judgment on all securities claims. The decision reinforces the importance of the definition of an "investment contract" for securities claims.

Vaxxinity, Inc.'s IPO was scheduled to occur on November 11, 2021. Vaxxinity board member James Chui mentioned to Vaxxinity's CEO, Mei Mei Hu, and its Executive Chairman, Louis Reese, that he was interested in purchasing $20 million of Vaxxinity stock in the IPO but could not transfer his money from overseas before the closing date. Hu and Reese knew that Ask America was also interested in purchasing IPO stock so they put Chui in touch with Ask America the day before the IPO. What resulted was an agreement in which (1) Ask America agreed to purchase and hold $20 million of Vaxxinity stock until Chui purchased it or until the "Liquidation Date" and (2) Hu and Reese guaranteed Ask America they would personally cover any investment loss and assure Ask America was paid $3.6 million. However, the three-page "Guaranty" did not include any requirement that Chui actually purchase the stock from Ask America.

Ask America purchased $20 million in stock in the IPO, but soon afterwards, Vaxxinity's stock price tumbled. When Ask America inquired when Chui was going to purchase the stock, it was told the purchase would occur in February, but that never happened. The parties then filed litigation. After the Court denied motions to dismiss, the parties filed cross motions for summary judgment.

Ask America's Claims

Ask America filed claims against Hu and Reese under the Texas Securities Act, for common law fraud, and for breach of contract. Hu and Reese moved for summary judgment on those claims.

The Court granted them summary judgment on the TSA claim because the "guaranty" did not involve an "investment of money in a common enterprise." *Id.* at *2 (citing *James v. Meineke*, 778 F.2d 20, 205 (5th Cir. 1985)). The guaranty did not contemplate the purchase of stock as an investment, but rather to buy and hold the stock until such time as Chui completed the underlying purchase. The Court added that the transaction did not involve much risk for Ask America because either Chui would buy the stock or Hu and Reese would be personally liable for any losses.

The Court, however, denied summary judgment to Hu and Reese on the common law fraud and breach of contract claims filed by Ask America. The Court found that Ask America presented evidence in its CFO's declaration that Hu and Reese told him Chui had already agreed to repurchase the stock when the Guaranty was executed, whereas Chui's declaration stated that no one even contacted him about entering into the Guaranty. The Court rejected the argument that there was no justifiable reliance, ruling that whether a party's reliance was justified is generally a fact question for the jury. It refused to grant summary judgment on the breach of contract claim because it overlapped with the fraud claim, and the jury must be the fact finder on damages to avoid a double recovery.

Vaxxinity Defendants' Claims

The Court also granted summary judgment to Vaxxinity Defendants on the claims made by Hu and Reese for business disparagement, federal and state securities law violations, and market manipulation. Hu and Reese claimed that Ask America made disparaging remarks about them that caused them to suffer losses. The Court rejected the business disparagement claim because Hu and Reese did not suffer a direct pecuniary loss (i.e., loss of sales, trade, or other dealings) from the decline in the share price. It granted summary judgment on the securities claims because neither Hu nor Reese sold securities to Ask America as part of the Guaranty transaction. And it granted summary judgment on the market manipulation claim because there was no evidence that Ask America's alleged statements affected the price of the securities. While Hu and Reese put forward a declaration from one third-party investor who claimed to sell his stock after hearing about the disparaging statements, they never drew a connection between the third party's sale of stock and any purported injury to them.

7. *Holland v. CryptoZoo Inc.*, 2025 WL 2492970 (W.D. Tex. Aug. 14, 2025) (Griffin, M.J.)

Key Takeaway: *Evaluating cryptocurrency products under the Howey test may prove difficult.*

In this action filed by 137 plaintiffs against a social influencer and others who promoted a cryptocurrency game and the sale of related products, Magistrate Judge Griffin issued a Report and Recommendation (R&R) concluding that the complaint adequately alleged the transactions at issue qualified as securities but recommended dismissal with leave to replead the multiple federal and state claims in the complaint. The opinion reflects the difficult task that federal courts face in determining whether entirely new cryptocurrency products such as games, tokens, and NFTs qualify as "investment contracts" under the *Howey* test, as well as the difficulty plaintiffs face in alleging individual reliance and/or fraud-on-the-market reliance when novel cryptocurrency products are involved.

Factual Background

Defendant Logan Paul is a social influencer, professional wrestler, and online entertainer with more than 23 million subscribers on his YouTube channel. According to the complaint, his "passion project" was developing a game called CryptoZoo in which purchasers would buy Zoo Tokens that could be used to buy products such as CryptoZoo non-fungible tokens ("CZ NFTs") that exist on the blockchain and appeared in the game in the form of "eggs." These CZ NFTs would hatch into different animals, which could be bred to form hybrid animals, each varying in value. The CZ NFTs could then earn their holders more Zoo Tokens – the game's form of currency.

Paul discussed his idea with others (collectively, the "Founder Defendants") and the Defendants eventually hired a developer to construct the online game and maintain the community of players. The Founder Defendants recognized the risk that the SEC might deem the tokens to be securities and, for that reason, initially locked the Zoo Tokens in a liquidity pool accessible only to them to effectuate a presale-adjacent distribution without attracting SEC attention. The complaint alleges that the tokens were then sold to the Founder Defendants "at an artificially low value" that allowed certain defendants to resell them after the project was publicly announced ("Zoo Day") for an immediate and large profit.

Beginning in August of 2021, before development was complete, Paul began to promote the CryptoZoo game on his YouTube channel. Paul allegedly touted CryptoZoo as "a really fun game that makes you money." He claimed it was backed by a "massive team," supported by "artists working around the clock," and funded by "like a million dollars." Nearly 20,000 people purchased CryptoZoo products after these statements, including all but one of the 137 plaintiffs. In the months and years ahead, Paul continued to claim the game was being developed, and more people purchased Zoo Tokens in anticipation of its completion. But the software development was never completed. Paul ultimately admitted the game would not be released and discouraged people from buying more tokens. Each of the named plaintiffs lost their investment, ranging from $100 to $350,000. They filed suit against the defendants in February 2023.

Defendant Logan Paul moved to dismiss under Rule 12(b)(6).

Court Analysis

The Court's lengthy R&R addresses a variety of issues, including choice of law (Texas, California, or multiple jurisdictions); pleading standards (shotgun pleading and group pleading); piercing the corporate veil (for contract and tort claims); eight common law claims; 15 state statutory violations; and four federal statutory claims. For nearly all issues and claims, the Court recommended dismissal with leave to replead. This summary focuses on the Court's analysis of plaintiff's 10b-5 claim.

Application of the *Howey* Test

The Court first applied the *Howey* test to determine if the Zoo Tokens and CZ NFTs qualified as "unregistered securities" as alleged in the complaint. Noting that Defendant Paul did not dispute the first two elements of the *Howey* test ((1) an investment of money (2) in a common enterprise), the Court focused on the third element, whether profits were derived solely from the efforts of others.

Paul argued that CryptoZoo's Terms and Conditions made no guarantees regarding the value of its products, characterized the NFTs as art products, expressly disclaimed that CryptoZoo was an

investment vehicle, and admonished purchasers against any expectation of profits. The Court quickly rejected this argument as form over substance, noting that whether something is a security depends on the economic realities and totality of the circumstances. *Id.* at *26 (citing *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) and *SEC v. Balina*, 2024 WL 2332965, at *11 (W.D. Tex. May 22, 2024)).

Paul also argued that the volatility of the cryptocurrency market foreclosed any reasonable expectation of profits from the efforts of defendants. The Court rejected this argument because all securities are speculative in nature, and Paul had not demonstrated that CryptoZoo's market was more volatile than cyptocurrency markets in other cases found to be securities. *Id.* at *28. Instead, the Court looked at the factors considered by the Court in *SEC v. Coinbase, Inc.*, 726 F. Supp. 3d 260, 279 (S.D.N.Y. 2024). In that case, defendants provided a platform and other services for customers to transact in different crypto assets, and they advertised and promoted the ways in which their technical and entrepreneurial efforts would be used to improve the value of those assets even after they were made available for trading on the secondary market. The *Coinbase* court looked to a variety of factors, including promotional materials; advertisement statements (including, an issuer's statement that it was "working around the clock" on the platform); the degree to which the issuers touted their expertise; and what benefits, if any, the issuers advertised in connection with crypto asset ownership. Using CryptoZoo's "terms and conditions" and various public statements made by Paul and the other defendants, the Court concluded the plaintiffs sufficiently alleged the transactions at issue qualified as investment contracts, and therefore, securities.

Failure to Allege Individual Reliance or "Fraud on the Market"

The Court ultimately ruled the complaint failed to allege individual reliance on Paul's various statements, noting that all but one of the plaintiffs had purchased Zoo Tokens or CZ NFTs before Paul made allegedly material misstatements about the continuing development of the game and there were no specific allegations of individual reliance by the one plaintiff who purchased later. As to plaintiff's invocation of the "fraud-on-the-market" presumption, the Court noted the complaint's failure to allege any of the elements necessary to invoke it (*i.e.*, that the alleged misrepresentation was publicly known, that it was material, that the stock traded in an efficient market, and that the plaintiff traded between the time the misrepresentation was made and the truth revealed).

The R&R is an interesting read for those interested in the law applicable to cryptocurrency claims. The R&R has already drawn some objections from the parties so we will wait to see how the district court rules on them.

8. *Jana v. WalMart, Inc.*, 2025 WL 2529933 (E.D. Tex. Aug. 15, 2025) (Davis, M.J.)

Key Takeaway: *Even pro se whistleblowers may avoid dismissal of retaliation claims if the factual allegations are strong enough.*

Magistrate Judge Davis recommended denying WalMart's motion to dismiss a *pro se* whistleblower retaliation claim under the Sarbanes-Oxley Act (SOX) and under the recently enacted Criminal Antitrust Anti-Retaliation Act (CAARA). Based on the plaintiff's allegations that (1) the Company selected a data-science vendor based in India without strong data scientists, (2) the vendor charged more than $1 million on a $180,000 bid contract, and (3) the vendor was hired again at the recommendation of an Indian citizen who was the whistleblower's superior, the Court recommended

the case go forward. Even with the imposing standards for whistleblower retaliation claims and a *pro se* plaintiff, the opinion demonstrates that strong factual allegations are hard to overcome on a motion to dismiss.

Dilip Jana began working at WalMart as a Principal Data Scientist in March 2020 and was promoted to Director of Data Science in 2023. Shortly thereafter, Jana's supervisor, Adrian Milbourne, asked Jana to participate in the bid selection process for a data-science vendor. WalMart received a $180,000 bid from InfoGain, an India-based company that Ridhi Mehra, Melbourne's supervisor, recommended. It also received a joint bid from Deloitte and Google for $300,000. After reviewing the bids, Jana recommended Deloitte and Google because InfoGain would not produce strong quality work and lacked strong data scientists. Mehra, Milbourne, and one of Jana's colleagues, Kamil Bay, nevertheless selected InfoGain.

InfoGain almost immediately began charging WalMart more than its bid price, reaching a total of almost $1 million. It also failed to deliver results that could have saved WalMart billions. Despite InfoGain's poor performance, Mehra and Milbourne gave the company additional projects, including one six-month project that was worth millions. Mehra also visited InfoGain in India where she was a citizen. At this point, Jana began informing his WalMart supervisors that he suspected shareholder fraud, antitrust violations, FCPA violations, procurement fraud, and other types of fraud. WalMart investigated Jana's claims but closed the investigation without informing him of the results.

One week later, WalMart's HR department recommended that Jana be terminated. Milbourne reprimanded him for failing to deliver on a project, and Mehra refused to meet with Jana. Jana then filed a formal ethics complaint against Milbourne and publicly criticized Mehra. Shortly thereafter, he was terminated. One year later, WalMart terminated Mehra, Milbourne, and Bay.

WalMart moved to dismiss Jana's whistleblower retaliation claim arguing that he did not engage in protected activity because he did not have an objectively reasonable belief that a SOX or CARRA violation occurred. WalMart said he lacked a legal understanding of the claims, and no reasonable person would arrive at his legal conclusions. Jana disagreed, noting that he had pled enough facts under Rule 8's pleading standard. The Court agreed, noting that WalMart found Jana's alleged violations credible enough to investigate and the allegations of retaliation were sufficient to state a claim.

The legal battle before the Court focused on the First Circuit's opinion in *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009), which requires a plaintiff to "at least approximate the basic elements of the underlying claim in his complaint." The Court disagreed, noting that the Fifth Circuit has not adopted *Day* and that a footnote in *Allen v. Administrative Review Board*, 514 F.3d 468, 480 (5th Cir. 2008) did not either. As such, WalMart's "attempt to litigate the factual reasonableness of Jana's belief at this stage fails." *Id.* at *5 (citing *Wallace v. Tesoro Corp.*, 796 F.3d 468, 479-80 (5th Cir. 2015)). The Court reached a similar conclusion under CAARA.

Finally, the Court found that WalMart's argument that it would have fired Jana anyway because he "engaged in insubordination and created a toxic work environment" raised fact questions that could not be decided on a motion to dismiss. WalMart claimed that an email from HR cited in the complaint raised this issue, but the Court ruled the email did "not demonstrate beyond doubt that WalMart would have fired Jana even without his whistleblowing."

9. *RPCG-GP I, LLC v. JPMorgan Chase Bank, N.A.*, 2025 WL 2174164 (N.D. Tex. July 31, 2025) (Boyle, J.)

Key Takeaway: *The Texas Savings Statute tolls limitations when a claim is dismissed and refiled within 60 days, but it does not override a statute of repose.*

In this dispute arising from a consumer-debt Ponzi scheme, Judge Boyle dismissed plaintiff's claim against JPMorgan Chase for aiding and abetting under the Texas Securities Act (TSA) but allowed claims for fraud and conspiracy to go forward.

RPCG-GP I ("Redpoint") "invested" $30 million with purported financiers who claimed they would buy $316 million in consumer debt at a discount. When the fraudsters absconded with the money, Redpoint sued JPMorgan Chase because it opened the fraudsters' bank account where Redpoint wired its money. Redpoint filed claims against JPMorgan Chase for fraud, conspiracy, and aiding and abetting under the § 4008.55(c) of the TSA. JPMorgan Chase moved to dismiss all claims as barred by limitations.

The Court first addressed the statute of limitations applicable to plaintiff's common law fraud and conspiracy claims, ruling that Redpoint pleaded a basis for tolling under the Texas Savings Statute, TEX. CIV. PRAC. & REM. CODE § 16.064. The Texas Savings Statute tolls limitations if a claim is dismissed but refiled within 60 days. In this case, Redpoint's purported assignee (Cruden) filed the same claims and was dismissed for lack of standing. Redpoint refiled the claims within 60 days of that dismissal, so the new action was filed within the extended statutory tolling period.

JPMorgan first argued that the Texas Savings Statute only applies when the same plaintiff files a second action, but the Court disagreed based on the statutory language and refused to read in this requirement. JPMorgan Chase then argued that Redpoint was not entitled to the benefit of the Texas Savings Statute because it intentionally disregarded proper jurisdiction. The Court noted that the statute was drafted because even "capable lawyers" often make "good faith" mistakes on jurisdiction, and Redpoint alleged that it believed its assignee "had the rights to act on Redpoint's behalf for all its causes of action" even though it did not. Based on this allegation, the Court "does not find that Redpoint intentionally disregarded proper jurisdiction." It denied the motion to dismiss the fraud and conspiracy claims and did not reach the issue of equitable tolling that Redpoint also raised.

The Court reached a very different result on limitations under the TSA because it contains a statute of repose that bars suit "more than five years after the date of sale." TEX. GOV'T CODE § 4008.062(b)(2). Since the sale at issue in this case occurred more than five years before Redpoint's suit was filed, the Court granted JPMorgan Chase's motion to dismiss the aiding and abetting claim. Redpoint tried to argue that the TSA claim related back to the complaint filed in the prior lawsuit, but the Court rejected that argument. *Id.* at *7 (citing *Johnson v. Lamartiniere*, 387 F. App'x 470, 472 (5th Cir. 2010) (ruling that FRCP 15 "does not contemplate a subsequent complaint to relate back to a prior complaint that has been dismissed). Moreover, the Court noted that FRCP 15 only allows relation back when the applicable statute of limitations allows it. *Id.* (citing FRCP 15(c)(1)(A)).

10. *SEC v. Rodriguez*, __ F.Supp.3d __, 2025 WL 2265475 (W.D. Tex. Aug. 7, 2025) (Cardone, J.)

Key Takeaway: *Courts must apply the Winter factors to SEC requests for injunctive relief, but other factors may be relevant to the likelihood of future violations.*

In this short decision on the SEC's motion for remedies against an individual who pled guilty to operating a fraudulent scheme that bilked clients of more than $5.5 million and did not make an appearance in the SEC's parallel civil action, Judge Cardone addressed the legal question of what factors should apply to the SEC's request for injunctive relief. Generally, courts in the Fifth Circuit have applied the 5-factor test set forth in *SEC v. Blatt*, 583 F.2d 1324, 1334 & n.29 (5th Cir. 1978), but a recent U.S. Supreme Court decision ruled that absent a clear command from Congress, all requests for injunction should be evaluated under the 4-factor test set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008). *Starbucks v. McKinney*, 602 U.S. 339, 345-46 (2024) (citing the 4-factor test in *Winter*). Based on the Supreme Court's direction, the district court applied the *Winter* factors to the SEC's request for injunctive relief but made use of the *Blatt* factors when evaluating the likelihood of irreparable harm.

Blatt sets forth the following five factor test: (1) the egregiousness of the defendant's conduct; (2) the degree of scienter; (3) the isolated or recurrent nature of the violation; (4) the sincerity of the defendant's recognition of his transgression; and (5) the likelihood of the defendant's job providing opportunities for future violations. *Blatt*, 583 F.2d at 1334. By contrast, *Winter* applied a traditional four-factor test for injunctive relief: (1) whether the plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities, and (4) whether an injunction is in the public interest.

After discussing *Blatt* and *Winter*, and noting that the Fifth Circuit had not yet "explicitly abrogated its previous SEC injunction jurisprudence," the district court adopted the following test for evaluating the SEC's request for injunctive relief: (1) whether the SEC has succeeded on the merits; (2) whether the SEC is likely to experience irreparable harm absent an injunction; (3) whether the balance of the equities tip in the SEC's favor; and (4) whether an injunction for the SEC is in the public interest. *Id.* at *2 (citing *SEC v. Barton*, 135 F.4th 206, 226 (5th Cir. 2025).[2]

The Court then found (1) the default judgment against Rodriguez demonstrated the SEC had achieved success on the merits; (2) the SEC was likely to experience irreparable harm if Rodriguez was not enjoined from future violations; (3) the balance of equities favored the SEC because of the likelihood of future violations and the minimal burden on Rodriguez to obey the law; and (4) an injunction was in the public interest because it would protect defrauded investors and uphold the securities laws. *Id.* at *3-4.

The most interesting aspect of the case was the issue of irreparable harm. The SEC argued that the Court should apply the *Blatt* factors to determine the likelihood of future violations, and the Court agreed. It stated that the *Blatt* factors have "consistently been used by courts to assess the likelihood of future violations" so "they have continued relevance in determining the likelihood of

[2] For a discussion of the *Barton* case, in which the Fifth Circuit ruled the district court did not abuse its discretion in applying a 2-part test that only required a "reasonable likelihood" of future violations but cited the *Winter* case in a footnote, see FH 2Q25 Newsletter, at 8-10.

irreparable harm here." *Id.* at *3. Applying the *Blatt* factors, the Court then found a likelihood of irreparable harm because (1) the scale of defendant's scheme and the total loss amount were egregious; (2) lying to clients and his employer, creating fake email addresses, and falsifying documentation demonstrated a high degree of scienter; (3) the harm was recurrent since the scheme continued over three years and involved multiple clients, (4) the defendant's failure to appear in the civil case showed a lack of remorse, and (5) the defendant will still be young enough when released from prison to have the opportunity in a new job to engage in future fraud. *Id.*

11. *CS Diagnostics Corp. v.* Wilson, 2025 WL 2664243 (N.D. Tex. Sept. 17, 2025) (Horan, M.J.)

Key Takeaway: *The burden to plead subject matter jurisdiction is a low bar.*

Magistrate Judge Horan ruled that CS Diagnostics, Corp. ("CSDX"), adequately asserted a basis for subject matter jurisdiction against non-US resident Luke Wilson for violation of Section 10(b) of the Exchange Act. Issues of personal jurisdiction and extraterritorial application of Section 10(b) remain to be litigated.

In its most recent complaint – the third filed in this action – CSDX alleged that Wilson violated Section 17(a) of the Exchange Act. That section does not provide a private right of action and requires broker dealers to maintain certain records and file reports. However, the Court interpreted the complaint liberally to allege a claim against Wilson for fraud in a securities transaction or investment, including by making false statements. According to the Court, the pleading burden to establish federal question jurisdiction is low and CSDX met that burden by offering facts that "could still tie the alleged Section 10(b) violation to the United States and therefore provide a basis to believe that it's not seeking just to apply Section 10(b) extraterritorially." *Id.* at *3. Thus, the Court allowed CSDX to conduct jurisdictional discovery into whether Luke Wilson was subject to personal jurisdiction in the United States and ordered CSDX to submit its proposed discovery requests to the Court by October 17, 2025.

12. *U.S. v. Sagoo*, 2025 WL 2689912 (N.D. Tex. Sept. 19, 2025) (O'Connor, C.J.)

Key Takeaway: *The Jarkesy opinion (right to a jury trial in SEC actions) has broad application.*

This short opinion dismissing a government action for judgment to enforce an IRS civil penalty demonstrates the potentially broad reach of the U.S. Supreme Court's *Jarkesy* opinion. *Jarkesy* held that the Seventh Amendment to the U.S. Constitution entitles the defendant to a jury trial when the SEC seeks civil penalties for securities fraud and the "public rights" exception to federal jurisdiction does not apply.

Sharnjeet Sagoo was a U.S. citizen or resident with multiple financial accounts in Kenya, India, and England. During 2011, 2012, and 2013, the total balance of her foreign accounts was between $1 and $2 million. Pursuant to the Bank Secrecy Act, Ms. Sagoo was required to file a Foreign Bank and Financial Accounts Report (FBAR) in each of those years. The Bank Secrecy Act requires reporting of such accounts and amounts, but it does not make it illegal to hold such funds and does not tax them. Because Ms. Sagoo failed to file FBARs from 2011-13, the IRS imposed a civil penalty on her of $1,020,922.50. The United States filed this action to obtain a judgment against her. Ms. Sagoo

moved to dismiss the action based on the government's violation of the provisions of the Bank Secrecy Act, the excessive fines clause of the Eighth Amendment, and the right to a jury trial under the Seventh Amendment.

Chief Judge O'Conner granted the motion to dismiss for violation of her rights under the Seventh Amendment and did not reach the other grounds for dismissal. Notably, the government conceded that the Seventh Amendment applied and did not argue for a "public rights" exception. Instead, the government argued that the Seventh Amendment was not implicated because Ms. Sagoo had a right to *de novo* review of her liability for the willful FBAR penalties before a jury in federal court.

The Court disagreed, noting that the government cited no authority "supporting the proposition that the constitutional guarantee of a jury trial is honored by a trial occurring *after* an agency has already found the facts, interpreted the law, adjudged guilt, and levied punishment." *Id.* at *3 (quoting *AT&T, Inc. v. FTC*, 135 F.4th 230, 242 (5th Cir. 2025)). In short, a jury trial that follows an assessment of civil penalties falls short of what the Seventh Amendment requires. *Id.*

II. STATE CASES

A. Texas Business Court Cases

1. *Reed v. Rook TX, LP*, 2025 WL 1713358 (Tex. Bus. June 18, 2025) (motion for remand) and 2025 WL 2447797 (Tex. Bus. Aug. 25, 2025) (renewed motion for remand) (Andrews, J.)

Key Takeaway: *The Texas Business Court has jurisdiction over third party claims about the interpretation of governance documents – but sometimes a plaintiff can replead to avoid Business Court jurisdiction.*

On a motion to remand after removal, Judge Melissa Andrews ruled that fraud and other claims alleging an illegal scheme to rig the April 2023 Texas lottery and conceal the identify of those involved fell within the Business Court's jurisdiction to hear cases concerning the partnership's "governance, governing documents, or internal affairs." Plaintiff Reed challenged the partnership's right to receive $95 million in lottery winnings because the Delaware limited partnership (Rook) was not formed until after the lottery results were announced (however, the Court noted that Rook's public filing of a certificate of formation did not necessarily establish the date the partnership was formed under Delaware law). Allowing the case to go forward to discovery, the Court ruled that its jurisdiction was not limited to "internal affairs" but also included disputes between Texas businesses and third parties if they involve a partnership's governance or governing documents.

After the Court's ruling, the plaintiff amended his petition to remove the claims that established jurisdiction in the Business Court and renewed his motion to remand. The Court then granted plaintiff's motion, noting that in this exceptional case, the plaintiff was master of his action.

Initial Motion to Remand

Plaintiff Reed won $7.5 million in the April 2023 Texas lottery and defendant Rook won $95 million. Reed sued Rook in Travis County, alleging that Rook fraudulently rigged the lottery in violation of the Government Code and the Administrative Code by purchasing lottery tickets on credit

or through unlawful group-purchase arrangements and violating other lottery rules. He also alleged that Rook was "a vehicle [] to hide the identity of the company(s) and individual(s) who received the proceeds of the illegal game rigging scheme."

Rook timely removed the case to the Texas Business Court, and Reed filed a motion to remand. Reed argued that (1) the Court lacked jurisdiction because Rook was not formed until June 2023 when it filed a certificate of formation with the Delaware Secretary of State; (2) the predominant "nature of the controversy" concerns the fairness of the Texas lottery, not the "internal affairs" of the entity; and (3) at least some of Reed's claims should be remanded because he pleaded independent grounds for recovery. The Court rejected all of Reed's arguments.

The Texas Business Court has jurisdiction over an action regarding "the governance, governing documents, *or* internal affairs of an organization" when the amount in controversy exceeds $5 million. TEX. GOV'T CODE § 25A.004(b)(2) (emphasis added). The Code defines "governing documents" as "the instruments, documents, or agreements adopted under an organization's governing law to govern the organization's formation and internal affairs." *Id.* § 25A.001(3)(A). It defines "internal affairs" as "the rights, powers, and duties of an organization's governing persons, officers, owners, and members and matters relating to the organization's membership or ownership interests." *Id.* § 25A.001(7). While the statute does not define governance, the Court looked to the definition of "governing person" and concluded that governance "relates to the management and direction of the entity's affairs under its governing documents and applicable law." *Reed*, 2025 WL 1713358, at *3.

Armed with these definitions, the Court ruled that the allegations about influencing the lottery selection process and concealing the identity of those involved in the alleged scheme all concerned the management and direction of Rook, the validity of its formation, and the duties of its governing persons – all matters covered by the jurisdictional statute. The allegations of fraud in claiming the prize likewise concern the legal documents adopted to govern Rook's formation. Accordingly, the action necessary concerns Rook's governance, governing documents, or internal affairs.

The Court then rejected Reed's argument that the date of formation could be determined solely by reference to the certificate of formation filed with the Delaware Secretary of State on June 15, 2023. The Delaware statute specifically notes that a limited partnership is "formed at the time of the filing of the initial certificate or limited partnership *or at any later date or time specified in the certificate of limited partnership if, in either case, there has been a substantial compliance with the requirements of this section.*" *Id.* at *5 (citing 6 Del. Code § 17-201(b)). Curiously, the Court did not discuss the meaning of the term "later" but instead noted that "merely filing a document labelled as a certificate of limited partnership does not, alone, create a duly formed limited partnership" because the validity and effectiveness revolve around the partnership's governing documents.

The Court rejected Reed's argument that Business Court jurisdiction should be limited to "internal" business disputes, noting that the statutory language does not exclude "external" business disputes between a third party and the defendants. *Id.* at *6. It emphasized that the statute uses the disjunctive "or" to grant jurisdiction over governance, governing documents, *or* internal affairs. *Id.*

The Court also rejected Reed's suggestion to apply a "nature of the controversy" or predominance test. Reed argued that his claims for money had and received, equitable relief for money had and received, and negligence *per se* predominantly focused on the fairness of the Texas lottery.

The Court "decline[d] to superimpose any judicially crafted predominance or centrality requirements into the statute." *Id.* The legislature knew how to include a predominance test if it intended to do so, and "[a] lawsuit can concern more than one thing." *Id.*

Finally, the Court rejected Reed's invitation to determine whether some of his claims (e.g., negligence *per se*) stood on independent grounds and should be remanded. Rather than determine whether it had supplemental jurisdiction over such claims, the Court ruled that jurisdiction under extends to the entire action absent some jurisdictional limitation or exception." *Id.* at *7.

Renewed Motion to Remand

After the Court denied his motion to remand, plaintiff amended his petition to remove the governance, governing documents, and internal affairs allegations from his petition. Specifically, he removed allegations concerning Rook TX's formation date, whether the Rook defendants were created for an improper purpose, and piercing the corporate veil. Rook dropped his original claims against the Rook defendants except for "money had and received" and "expressly disclaim[ed] any allegation, legal theory, or request for relief that requires this Court to interpret, apply, or enforce the governance, internal affairs, or governing documents of any Defendant entity." He added a claim for tortious interference and then filed a renewed motion to remand.

Reed argued that subject matter jurisdiction no longer existed in the Business Court. While defendants conceded the new pleading removed subject matter jurisdiction under Section 25A.004(b), they argued the Court still had jurisdiction under other provisions of Section 25A.004, including Section (b)(3) for actions asserting a claim under trade regulation or securities law against certain defendants; Section (d)(1) for actions arising out of qualified transactions; and Section (f) – supplemental jurisdiction.

Addressing these argument in reverse order, the Court first noted that it initially asserted original jurisdiction (not supplemental jurisdiction) over all Reed's claims. Accordingly, because it no longer had original jurisdiction, it could not continue to have supplemental jurisdiction.

The Court then noted that Reed's allegations did not involve a qualified transaction. Even assuming Reed's purchase of a lottery ticket creates a contract, it was not a contract for more than $10 million that was accepted by the state. Although Reed's pleading alleged he would have won more than $10 million if the Rook defendants were not in the lottery, that was not a deal he made with the State. Moreover, since Reed paid only $1 for his lottery ticket, the consideration for the transaction on his side did not meet the value hurdle.

Finally, the Court rejected the argument that the Texas Lottery Act was a trade regulation law. It added that Reed's *negligence per se* claim did not seek a remedy under the Texas Lottery Act but merely supported his claim with allegations that provisions of the Act were violated. Even assuming the Act was a trade regulation, his claim arose under general tort law – not the Act.

The case stands for the proposition that a plaintiff can replead and avoid the jurisdiction of the Business Court under certain circumstances. As the Court stated in its opening paragraph:

> This case has proved itself the exception to the rule in many instances, but it exemplifies at least one: the plaintiff is the master of the complaint. Although this is

> not the kind of case one might typically expect to find in the Business Court, Reed (perhaps unintentionally) pleaded his way into this Court's jurisdiction by alleging claims regarding the Rook defendants' governance, governing documents, and internal affairs. Now, although later events generally do not divest a court of jurisdiction once properly acquired,[3] Reed has successfully pleaded his way out of this Court's jurisdiction by removing all such claims from his pleadings.

Id. at *1.

2. *Riverside Strategic Capital Fund I, L.P. v. CLG Investments, LLC*, __ S.W.3d __, 2025 WL 2675795 (Tex. Bus. Sept. 17, 2025) (Whitehill, J.)

Key Takeaway: *Inquiry notice is still enough to bar claims on limitations grounds.*

Judge Whitehill dismissed a 2025 action for fraud, conspiracy, and other claims arising out of alleged misrepresentations in a 2017 stock purchase agreement. Plaintiffs claimed the defendants misrepresented that the company, True Health Group LLC (THG), was in material compliance with all healthcare laws when plaintiffs invested $50 million and signed a stock purchase agreement in January 2017. The defendants showed through public documents, Board materials, and other information that plaintiffs had at least inquiry notice of the alleged healthcare fraud by at least April 6, 2020.

Plaintiffs invested nearly $80 million in THG, a company that provided laboratory management and diagnostic services for the healthcare industry. At the time of their initial investment of $50 million on January 26, 2017, plaintiffs were aware of online articles accusing THG's predecessor of healthcare fraud and a Medicare investigation into the Company's billing practices. Two months later, the DOJ sent the Company an investigative demand concerning a possible kickback scheme and other violations. By June 2017, the Centers for Medicare & Medicaid Services (CMS) suspended all payments to the Company due to credible allegations of fraud in its billing and claim submission. After CMS reduced the suspension to 35% of Medicare payments, the plaintiffs invested a second $30 million and took control of the Board.

During the next two years, the Company took substantial steps to address DOJ's and CMS's concerns, including hiring regulatory counsel and financial advisors. By June 2019, the Company reached a settlement agreement regarding the first suspension. But one week later, the Company was placed on a second 100% Medicare suspension due to new credible allegations of fraud. The Company sued CMS to stop the suspension and filed a declaration describing various corporate wrongdoing in detail, including new schemes to use rural hospitals to obtain higher reimbursement rates and medical services organizations to funnel kickbacks to doctors. The Court denied the Company's request for a preliminary injunction. One week later, the Company filed for bankruptcy. The liquidating trustee later filed a lawsuit describing the new fraud schemes in detail.

Plaintiffs 2025 lawsuit was based on the new fraud allegations, but the Court ruled plaintiffs were on inquiry notice of the fraud by at least April 6, 2020. Since fraud and related conspiracy claims were subject to a four-year statute of limitations, the Court dismissed the action.

B. Other Texas Appellate Cases

1. *Kay v. Yosowitz*, __ S.W.3d __, 2025 WL 1912208 (Tex. App. - Houston [14th Dist.] July 10, 2025) (Christopher, C.J.)

Key Takeaway: *Expert testimony on damages can make or break your case.*

Plaintiff obtained a jury verdict awarding her $53 million on a derivative claim for breach of fiduciary duty based on theft of corporate opportunity and diversion of company assets, but the appeals court reversed and remanded because the plaintiff's expert improperly equated the company's damages to the profits of the competing start-up company even though it offered services different from those of the Company. The posture of the case is interesting because it was based on breach of contract and fiduciary duty claims arising out of a divorce settlement in which the husband and wife divided their ownership interest into a combined real estate brokerage and software business, and the husband transferred the software to a new company he formed.

Factual Background

The background of this action is based on a divorce settlement. Martin Kay and Laura Yosowitz owned as community property a 78% interest in a Nevada limited-liability company called Greenlet LLC. Robert Salmons owned the remaining 22% membership interest. Greenlet operated a traditional real estate "Brokerage Business" and a "Software Business." Kay and Yosowitz's Agreement Incident to Divorce (AID) included provisions requiring the "net proceeds" from their community properties to be distributed 46.8% to Yosowitz, 31.2% to Kay, and 15% to Greenlet.

In addition, attached to the AID was a Memorandum of Agreement (MOA) among Kay, Yasowitz, and Salmons in which they agreed (1) Kay and Yasowitz's 78% interest in Greenlet would be transferred to a new company called Holdco; (2) Greenlet would continue to run the "Brokerage Business" with Salmon owning 22% of Greenlet and Holdco owning the remaining 78%; and (3) Greenlet's "Software Business" would be contributed to a new entity called IP Newco, owned 95% by Holdco and 5% by Salmons. By these transactions, Kay and Yasowitz would cease to be members of Greenlet but would become members of Holdco that owned a majority of Greenlet and IP Newco. The MOA further provided that Kay would own a 76.65% interest in Holdco plus all voting rights, and Yasowitz would own a 23.5% interest in Holdco and no voting rights.

Shortly after the divorce, Kay formed a Wyoming company and licensed Greenlet's software to it. He then effectively dissolved Greenlet, used the same software developers that Greenlet had used to update the software and expand its functionality, made the Wyoming company more successful than Greenlet, and raised $38 million from institutional investors based largely on the success of the updated technology.

After the divorce, Yosowitz received only a single check from Greenlet for $39,000 – a smaller amount than she expected under the terms of the AID and MOA. She then sued Kay and Salmons individually and on behalf of Greenlet for failure to comply with the AID, failure to comply with the MOA, and breach of fiduciary duties that Kay owed Greenlet as its manager. The jury found for Yosowitz on all her claims. It awarded $138 million in damages to Greenlet which the court used to calculate an award of $54 million to Yosowitz (i.e., 39% of the award or half of Holdco's 78% interest

in Greenlet). As for her individual claims, the jury assessed damages of $378,000 against Kay, and the trial court awarded her this amount as well.

Appeal

Kay raised four issues on appeal: (1) the MOA capped Yosowitz's damages at $4.25 million (the redemption price plus maximum bonus amount); (2) Yosowitz lacked standing to bring a derivative claim on Greenlet's behalf because she has never been a member of that LLC; (3) even if Yosowitz had standing, the award of $54 million in Greenlet's damages were based on an improper measure of damages and legally insufficient evidence, and (4) the evidence on Yosowitz's direct claim for breach of the AID lacked sufficient evidence to support it.

The Court overruled the first, second, and fourth issues but reversed and remanded the derivative damages award and instructed the trial court to segregate attorney's fees on Yosowitz's individual damages claim.

On the first issue, it ruled that the MOA did not cap Yosowitz's damages and specifically contemplated additional distributions that were not to be credited toward the redemption amount. Moreover, the MOA addressed amounts that Holdco must pay, not amounts recoverable from Kay. Finally, even if the MOA capped her damages, she filed individual claims based on the AID, and it did not contain any redemption provision or cap on damages.

On the standing issue, Kay argued that Yosowitz was never a member of Greenlet and lacked standing to sue on its behalf. The Court disagreed, noting that the jury was never instructed on the prerequisites for membership or that membership was governed by the operating agreement. Moreover, Kay never objected to the jury charge and admitted that it accurately quotes the applicable Nevada law.

On the sufficiency of evidence issue, the Court ruled that K-1 forms from Greenlet in 2014 identified both Kay and Yosowitz as members. Since Kay never claimed Yosowitz's interest was transferred, there was at least some evidence showing she was a member so had standing to sue on Greenlet's behalf.

On the third issue, the Court agreed with Kay that there was insufficient evidence to support an award of $54 million but for Kay's breach of fiduciary duties. It was improper for Yosowitz's damages expert to equate Greenlet with the Wyoming company since the parties agreed to transfer all Greenlet's software business to IP Newco whereas the Wyoming company provided both brokerage and software services. The Wyoming company was effectively a start-up company with unique technology. It remanded the damages and damages allocation to the trial court.

On the fourth issue, the Court sustained the $138,000 individual damages award and directed the court to award her attorney's fees segregated for this claim.

2. *Triple G Ventures LLC v. Wang*, 2025 WL 2471795 (Tex. App. - Houston [1st Dist.] Aug. 28, 2025) (Dokupil, J.)

Key Takeaway: *Simply communicating with a Texas resident about an investment does not establish personal jurisdiction.*

This case addresses when a defendant who sells securities to a Texas resident is subject to personal jurisdiction in the state, and it is a good reminder that simply talking with a Texas resident about an investment opportunity may not be enough to establish specific personal jurisdiction. The Houston Court of Appeals affirmed the dismissal of this action for lack of specific personal jurisdiction, noting that (1) telephone calls and text messages to a Texas resident are not enough to establish specific jurisdiction; (2) contact with the forum state must be purposeful rather than random, fortuitous, or attenuated; and (3) sending contracts for a passive investment without any continuing obligations is not enough. Based on the jurisdictional discovery, the Court dismissed plaintiffs' claims for fraud, breach of fiduciary duty, violation of the 1933 Securities Act, and other causes of action.

Background

Heliogen was a privately held, California-based clean energy company backed by private investors, including Bill Gates. In early 2021, Heliogen sought to raise $75 million through a Simple Agreement for Future Equity (SAFE). Heliogen also planned to go public, possibly through merger with a special purpose acquisition vehicle (SPAC).

Investors Thomas Wang, who lives in Puerto Rico, and Aaron Boesky, who lives in Hong Kong, created a special purpose vehicle called AT Gekko SPV1, LLC (SPVI) to raise $10 million to invest in Heliogen and obtain a positive return when Heliogen went public. Wang and Boesky solicited investments in SPVI and prepared an offering memorandum explaining the investment opportunity, the investment scheme, and their conflicts of interest.

Also in early 2021, Wang's childhood friend introduced him to Robert Smith, a Dallas resident, because they both collected sports cards. Wang and Smith then began communicating by text, email, and WhatsApp. Eventually, their conversations turned to Wang's new venture. In his deposition, Smith admitted it was possible he initiated the discussion of Wang's business and the SPVI investment opportunity. Wang then introduced Smith to Boesky, and all of them discussed the opportunity.

After additional texts and telephone calls, Smith expressed a desire for himself and his friend, Kevin Casey, to invest in SPVI because of the likelihood Heliogen would go public, SPVI would distribute shares to him, and he could begin trading in the next six months. Wang said that he was investing $1M in the venture but cautioned Smith not to invest if he had concerns. Wang then sent an email to Smith and Casey with subscription documents. Less than 24 hours later, Smith and Casey invested $200,000 each in SPVI and sent their signed documents to SPVI's executive assistant. Smith listed his address in Dallas, and Casey listed his address in Houston, although the entity through which Casey purchased shares (Triple G Ventures) was registered in Wyoming.

The SPAC merger with Heliogen closed in December 2021, but SPVI did not distribute Heliogen shares to Smith and Casey right away. Emails among the parties referenced a lockup period. By the time they received their shares, the price of Heliogen stock had dropped and both Smith and

Casey suffered a loss on their investment. They sued Wang, Boesky, and SPVI for (1) improperly waiting to distribute Heliogen shares, (2) making fraudulent statements about the lockup, and (3) improper calculation of fees owed to SPVI. All defendants moved to dismiss for lack of personal jurisdiction.

Court Analysis

The district court dismissed the action for lack of specific personal jurisdiction (the sole argument made by plaintiffs). Plaintiffs appealed. Defendants argued the investment arrangement was fortuitous not purposeful and grew out of Wang and Smith's discussion about sports cards. Defendants denied that any of their activities created a substantial connection with Texas and presented jurisdictional evidence consisting of deposition testimony, emails and texts, and investment documents.

The Court explained that in the context of specific personal jurisdiction, minimum contacts requires that (1) the nonresident defendant has *purposefully availed* itself of the privilege of conducting activities in the forum state; and (2) there exists a "nexus between the nonresident defendant, the litigation, and the forum." *Id.* at *5 (quoting *Luciano v. SprayFoamPolymers.com, LLC,* 625 S.W.3d 1, 8 (Tex. 2021)). Three factors are relevant to determine purposeful availment:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third party. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. Thus, sellers who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to the jurisdiction of the latter in suits based on their activities. Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Id. (quoting *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 151 (Tex. 2013)). When a plaintiff alleges that communications are the basis for personal jurisdiction, a reviewing court must consider their quality and nature. "'On their own, numerous telephone communications with people in Texas do not establish minimum contacts' and 'changes in technology may render reliance on phone calls obsolete as evidence of purposeful availment' since a phone number [area code] no longer indicates anything about the location of the person receiving the call. *Id.* (quoting *Old Republic Nat'l Title Ins. Co. v. Bell*, 459 S.W.3d 550, 560 (Tex. 2018).

The Court then rejected each of plaintiffs' arguments for specific personal jurisdiction:

- Telephone calls, emails, WhatsApp, and videoconferencing with plaintiffs while they were in Texas. The nature and quality of these calls was initially focused on sports cards, and the discussion of Heliogen and SPVI was a fortuitous outflow from those discussions. Moreover, the jurisdictional evidence did not show that any of the defendants knew plaintiffs' locations before they received the signed subscription agreements and paperwork for SPV1.
- Plaintiffs signed the documents in Texas. The plaintiffs' actions are irrelevant to a jurisdictional analysis.
- Defendants pursued the plaintiffs. But the record evidence showed that Smith, not Wang, likely initiated the topic of investing in SPVI. Smith, not Wang, also pitched the idea to Casey.

- SPVI created a continuing obligation like the franchise agreements in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985). In fact, SPVI was a passive investment that gave plaintiffs no right to comment or control anything unlike the 20-year franchise arrangement in *Burger King* that included ongoing training and guidance.
- Defendants made fraudulent statements. "We cannot conflate the jurisdictional inquiry with the underlying merits of the case." *Id.* at *7.
- Defendants had continuing business relationships with others in Texas. While this might be relevant to general personal jurisdiction, it is not relevant to specific personal jurisdiction.

N. Scott Fletcher
Kenneth P. Held

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Securities and Commercial Litigation, Internal Investigations, and Enforcement Defense

808 Travis Street, Suite 1553
Houston, TX 77002

(713) 255-0422 (main)
(713) 255-0414 (Scott)
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