

UNITED STATES COURT OF APPEALS BUILDING  
JOHN MINOR WISDOM  
FIFTH CIRCUIT

# Fifth Circuit Securities Litigation Quarterly

Q2 2023

SHEARMAN & STERLING

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# Introduction

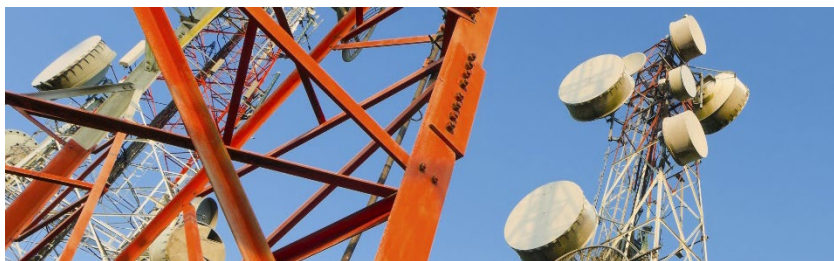


Welcome to the second edition of Shearman & Sterling's Fifth Circuit Securities Litigation Quarterly. As public companies and financial institutions continue to migrate to Texas, our Texas-based securities litigation team continues to help our clients navigate the unique landscape for federal securities litigation in the Fifth Circuit and to monitor all developments.

In our Q2 2023 edition, we cover new case filings and decisions of note, including multiple district court decisions on motions to dismiss.



# New Securities Class Action Filings



## ***DZS INC. (E.D. TEX., 23-CV-00549, FILED JUN. 14, 2023)***

Filed on behalf of a class of persons who purchased publicly traded DZS securities between March 10, 2023, and May 31, 2023

Asserts claims under the Securities Exchange Act of 1934

Alleges defendants “made false and/or misleading statements and/or failed to disclose that: (1) DZS’ financial statements from March 31, 2023 to the present included certain errors; (2) as a result, DZS would need to restate its previously filed quarterly financial statement for the period ending March 31, 2023; (3) the Company had ongoing undisclosed issues with its internal controls over financial reporting; and (4) as a result, Defendants’ statements about its business, operations, and prospects, were materially false and misleading and/or lacked a reasonable basis at all relevant times.”



## ***VERTEX ENERGY, INC. (S.D. TEX., 23-CV-02145, FILED JUN. 12, 2023)***

Filed on behalf of a class of persons who purchased Vertex common stock between April 1, 2022, and August 8, 2022

Asserts claims under the Securities Exchange Act of 1934

Alleges defendants made “false and misleading” representations about Vertex’s Mobile, AL refinery, including misleading statements regarding “[t]he true facts” that: (1) “hedges severely limited Vertex’s ability to capitalize on the record-high crack spreads that existed at the time of the acquisition [of the Mobile refinery]”; (2) “an inventory intermediation agreement . . . Resulted in Vertex incurring significant fees and inventory losses”; (3) “an inventory purchase agreement . . . triggered \$13.3 million in inventory losses”; (4) “Vertex experienced production issues that caused significant shortfalls in refined fuel volumes”; (5) “defendants overstated the purported profit margins that could be achieved at the refinery”; and (6) “the Mobile refinery did not ‘generate[] strong EBITDA’ ‘[d]uring the first 30 days of operations,’ and the Mobile refinery transition was not ‘seamless.’”

# Decisions of Note

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*Six Flags*: N.D. Tex. Dismisses Case on Article III Standing Grounds Following Fifth Circuit's Reversal of Prior Dismissal

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*Cassava Sciences*: W.D. Tex. Denies Motion to Dismiss

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*Concho Resources*: S.D. Tex. Adopts Magistrate's Recommendation to Deny Dismissal for Company and Certain Individuals But Dismisses Two Individuals

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*Alta Mesa Resources*: S.D. Tex. Denies Motion to Dismiss in Opt-Out Case



*Oklahoma Firefighters Pension & Ret. Sys. v. Six Flags Entertainment Corp.*,  
No. 4:20-cv-0201-P, 2023 WL 3781645 (N.D. Tex.  
June 2, 2023)

- Judge Pittman granted Defendants’ Rule 12(c) motion for judgment on the pleadings and entered final judgment for Defendants.
- Judge Pittman’s previous dismissal under Rule 12(b)(6) was reversed by the Fifth Circuit, as discussed in our 1<sup>st</sup> quarter update. In its opinion, the Fifth Circuit stated that Six Flags had “adequately tempered” its alleged misleading statements by October 2019.
- Following remand, the Court held that Plaintiff had no justiciable injury because it purchased its Six Flags stock after October 2019, when the Fifth Circuit stated Six Flags had “adequately tempered” the alleged misstatements. Similarly, another proposed plaintiff that purchased stock before October 2019 could not intervene because there is no “case or controversy” into which one can intervene when the original plaintiff lacks Article III standing.
- Prior to granting dismissal, Judge Pittman had granted Defendants’ motion to stay discovery during the pendency of their Rule 12(c) motion for judgment on the pleadings. The Court found that the PSLRA’s plain language stays discovery upon the filing of a Rule 12(c) motion, even when, as in *Six Flags*, the case has progressed beyond a Rule 12(b)(6) motion to dismiss and the Defendants have filed answers.
- Plaintiff has appealed the dismissal to the Fifth Circuit.

*In re Cassava Sciences, Inc. Sec. Litig.*,  
No. 1:21-cv-00751-DAE, 2023 WL 3442087 (W.D.  
Tex. May 11, 2023)

- Judge Ezra denied Defendants’ motion to dismiss.
- Plaintiffs alleged that Cassava “misrepresented the research on [a drug candidate] by manipulating data and failing to disclose conflicts of interest. By misrepresenting its research results, Defendants were able to raise millions of dollars to fund [the drug candidate’s] development and stood to personally profit from cash bonuses.”
- Plaintiffs adequately pled falsity because Cassava allegedly did not disclose unfavorable facts about the development of its drug candidate that allegedly rendered other affirmative statements misleading. The Court further found that it was not impermissible for Plaintiffs to rely on allegations drawn from third-party sources (commentary from the scientific community allegedly suggesting data manipulation) rather than any person with personal knowledge of the underlying facts.
- Plaintiffs adequately pled scienter based on (i) the reaction of the scientific community to news about Cassava’s research for its drug candidate, (ii) executive bonus plans tied to an increase in Cassava’s stock price, and (iii) an alleged desire to increase Cassava’s stock price to raise capital.







*In re Concho Resources Inc., Sec. Litig.*,  
No. 4:21-cv-02473, 2023 WL 4146278 (S.D. Tex.  
June 23, 2023)

- Judge Hanen largely adopted the Magistrate’s recommendation denying Defendants’ motion to dismiss, as discussed in our 1<sup>st</sup> quarter update.
- Plaintiffs alleged that defendant oil and natural gas company made false and misleading statements about a new development technique and left investors unaware of the true risks.
- As to the Company and several individual Defendants, the Court adopted the Magistrate’s recommendation that Plaintiffs adequately pled falsity and scienter.
- The Court declined to follow the Magistrate’s recommendation as to two individual Defendants and dismissed them from the case. As to those Defendants, Plaintiffs failed to plead a strong inference of scienter and pled no specific facts that they “knew anything untoward.”



*In re Alta Mesa Resources, Inc. Sec. Litig.*,  
No. 4:19-cv-957, 2023 WL 3873307 (S.D. Tex.  
June 7, 2023)

- Judge Hanks denied Defendants’ motions to dismiss directed to claims brought by plaintiffs that opted out of a securities class action.
- The Court rejected Defendants’ argument that SLUSA barred Plaintiffs’ state law fraud claims, holding that SLUSA preclusion did not apply because the state law claims were brought by fewer than 50 plaintiffs.
- Plaintiffs’ Texas law fraud claims survived. The Court declined to read Texas Supreme Court authority as categorically barring “holder” claims, which arise when a plaintiff alleges it has been misled into holding rather than selling securities.
- The Court found that Plaintiffs’ federal securities claims were not time barred, holding that Plaintiffs’ Section 14 claims were subject to a five-year fraud-based statute of repose.



# Shearman & Sterling Texas Securities Litigation Team



**Thad Behrens**  
Partner  
**Dallas**  
T +1 214 271 5812  
thad.behrens@shearman.com



**K. Mallory Brennan**  
Partner  
**Houston**  
T +1 713 354 4847  
mallory.brennan@shearman.com



**Dan Gold**  
Partner  
**Dallas**  
T +1 214 271 5821  
dan.gold@shearman.com



**Samuel W. Cooper**  
Partner  
**Houston**  
T +1 713 354 4838  
samuel.cooper@shearman.com



**Emily Westridge Black**  
Partner  
**Austin**  
T +1 512 647 1909  
emily.black@shearman.com



**David P. Whittlesey**  
Partner  
**Austin**  
+1 512 647 1907  
david.whittlesey@shearman.com



ABU DHABI  
AUSTIN  
BEIJING  
BRUSSELS  
DALLAS  
DUBAI  
FRANKFURT  
HONG KONG  
HOUSTON  
LONDON  
MENLO PARK  
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