Fifth Circuit Securities Litigation Quarterly

Q1 2024

SHEARMAN & STERLING

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Introduction

Welcome to the first 2024 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 monitor all developments and help our clients navigate the unique landscape for federal securities litigation in the Fifth Circuit.

In our Q1 2024 edition, we cover three new case filings, two class certification decisions, and other decisions of note.

New Securities Class Action Filings

SUNNOVA (S.D. TEX., 4:24-CV-00569, FILED FEB. 16, 2024)

Filed on behalf of a putative class of persons who purchased Sunnova Energy International Inc. common stock between February 25, 2020 and December 7, 2023

Asserts claims under the Securities Exchange Act of 1934

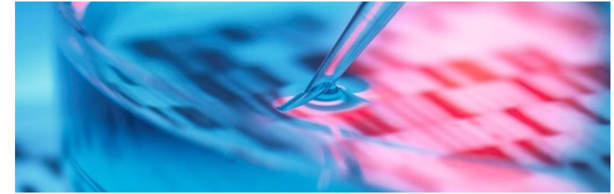
Alleges Defendants “made false and/or misleading statements and/or failed to disclose that: (i) Sunnova routinely engaged in predatory business practices against disadvantaged homeowners and communities ...; (ii) the foregoing conduct subjected the Company to a heightened risk of regulatory and/or governmental scrutiny, as well as significant reputational and/or financial harm; and (iii) as a result, the Company’s public statements were materially false and misleading at all relevant times."

CS DISCO (W.D. TEX., 1:24-CV-00028, TRANSFERRED JAN. 9, 2024)

Filed on behalf of a putative class of persons who purchased CS Disco common stock between July 21, 2021 and September 11, 2023

Asserts claims under the Securities Exchange Act of 1934

Alleges Defendants made false and/or misleading statements and/or failed to disclose that CS Disco “was benefiting from an unprecedented amount of revenue from a small number of unusually large” projects, its “projections were not based on the years of precedent [as], but on the unwarranted assumption that they would continue to receive similarly large [projects] going forward,” and a purported “pattern of harassing . . . employees” by a senior executive.



AGILON HEALTH (W.D. TEX., 1:24-CV-00297, FILED MARCH 19, 2024)

Filed on behalf of a putative class of persons who purchased agilon health common stock between January 9, 2023 and January 4, 2024, including those who acquired pursuant or traceable to the offering materials for agilon’s May 2023 secondary public offering.

Asserts claims under the Securities Exchange Act of 1934 and Securiites Act of 1933

Alleges Defendants “materially false and misleading statements and omissions to investors concerning agilon’s medical costs and profit margins.”

Decisions of Note

Cabot: Leave to Amend Granted and One Newly Challenged Statement Dismissed on Repose Grounds

Apache: Motion for Class Certification Denied-in-Part Based on Defendants' Proof of Lack of Price Impact

McDermott: Motion for Class Certification Denied Without Prejudice Due to Inherent Intra-Class Conflict and Need for Sub-Classes

Other Cases of Note: S.D. Tex. Dismisses Derivative Case for Failure to Plead Demand Futility; N.D. Tex. Dismisses Derivative Case for Failure to Plead Wrongful Refusal of Demand; Fifth Circuit Affirms Dismissal of Non-Class Securities Claims; Harris County District Court Sanctions Plaintiff's Counsel in ExxonMobil/Pioneer Merger Case

Delaware County Employees Ret. Sys. v. Cabot Oil & Gas Corp., 2024 WL 83503 (S.D. Tex. Jan. 8, 2024)

- Judge Rosenthal granted leave to file a second amended complaint adding new alleged misrepresentations and omissions, and dismissed with prejudice new challenge to one statement on statute of repose grounds.
- The court found the company's production guidance was not protected by the safe harbor for forward-looking statements because (i) plaintiffs adequately alleged defendants knew the company would not be able to meet the guidance, and (ii) the cautionary language accompanying the guidance was not tailored to the company and its circumstances at the time.
- The court held the challenge to the 2018 production guidance was barred by the statute of repose. The motion for leave to amend was filed more than five years after the guidance statement and did not relate back to the first amended complaint because it was based on distinct conduct and allegations.
- The court also found that plaintiffs adequately alleged certain new alleged omissions related to regulatory investigations and alleged violations.
- The court found that permitting amendment in this case based on litigation discovery was not inconsistent with applicable heightened pleading standards.

In re Apache Corp. Sec. Litig,
2024 WL 532315 (S.D. Tex., Feb. 9, 2024)

- Magistrate Judge Edison recommended that Plaintiffs' motion for class certification be granted-in-part and denied-in-part.
- Plaintiffs sought to certify a class of Apache common stock purchasers during the period September 7, 2016 through March 13, 2020, during which they alleged defendants misrepresented the prospects of a hydrocarbon play known as Alpine High.
- Defendants contested certification as to the period February 22, 2018 through March 13, 2020, arguing they had rebutted the fraud-on-the-market presumption of reliance during that period by demonstrating that the statements made during that time period had no price impact.
- The court agreed there was no "front-end" price impact during this period. The only statistically significant price increase following a challenged statement during this time period was caused by other positive news (not the alleged misstatement).
- The court also found there was no "back-end" price impact during this period. Two of the three alleged corrective disclosures during this time period did not reveal new information related to the alleged misstatements. As to the third alleged corrective disclosure, the court found an absence of price impact because the stock price decline was not statistically significant at a 95% confidence level unless an extended (three or four day) event window was used and the new information was not sufficiently corrective of the alleged misstatement.
- During the briefing on Plaintiffs' objections to portions of the magistrate judge's recommendations the parties reported reaching an agreement to settle the case.

Edwards v. McDermott Int'l, Inc.
2024 WL 873054 (S.D. Tex., Feb. 29, 2024)
2024 WL 1256293 (S.D. Tex., Mar. 25, 2024)

- Magistrate Judge Edison recommended that Plaintiffs' class certification motion be denied without prejudice to refiling to certify two sub-classes.

- Plaintiffs sought to certify a class of acquirers of McDermott International common stock. McDermott merged with Chicago Bridge and Iron Company ("CB&I") during the putative class period and plaintiffs alleged defendants made pre- and post-merger misrepresentations regarding CB&I projects.

- The court held lead plaintiff, which acquired McDermott stock in exchange for CB&I shares in the merger, did not necessarily lack standing because it benefitted from the alleged inflation in CB&I stock. The court reasoned that McDermott stock may have also been inflated at the time of the merger.

- The court found, however, that former CB&I shareholders have a fundamental conflict with other purchasers of McDermott stock because of differing incentives to show the extent to which each company's stock price was inflated by the alleged fraud. The court therefore found that two subclasses should be created — one of former CB&I shareholders and one of other McDermott shareholders—and that lead plaintiff was only adequate to represent the subclass of former CB&I shareholders.

- The court further found that Defendants demonstrated that some of the alleged corrective disclosures were not corrective of the alleged misstatements, reflecting the absence of price impact and requiring the class period be shortened.

- After both Plaintiffs and Defendants objected to the magistrate's recommendations, Judge Hanks adopted the recommendations with revisions to the wording of the proposed sub-class definitions.

Other Decisions of Note

***In re Cabot Oil & Gas Corp. Deriv. Litig.*,** 2024 WL 23365 (S.D. Tex. Jan. 2, 2024): Judge Rosenthal dismissed a derivative action for failure to plead demand futility, finding plaintiff did not allege a bad faith failure of oversight by members of the board of directors.

Cruz v. Reid-Anderson, 2024 WL 150443 (N.D. Tex. Jan. 12, 2024): Judge Pittman dismissed a derivative action for failure to plead that a litigation demand was wrongfully refused by the Six Flags board of directors. The court held that legal counsel to the board was not conflicted and did not dominate consideration of plaintiff's demand.

Talarico v. Johnson, 2024 WL 939738 (5th Cir. Mar. 5, 2024): Fifth Circuit affirmed dismissal of non-class securities claims on standing grounds and for failure to plead fraud.

Corwin v. Alameddine, No. 2024-02900 (190th Judicial District, Harris County Mar. 12, 2024): In a case challenging disclosures in connection with the merger of Pioneer Natural Resources and ExxonMobil, Judge Miller granted ExxonMobil's motion for sanctions against plaintiff's counsel, finding the claims against ExxonMobil were groundless and filed in bad faith and for an improper purpose.

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