Fifth Circuit Securities Litigation Quarterly

Q3 2023

SHEARMAN & STERLING

Contents

Introduction

Welcome to the third 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 Q3 2023 edition, we cover new case filings, settlements and decisions of note, including multiple motion to dismiss decisions and multiple class certification decisions.

New Securities Class Action Filings

***APPLIED DIGITAL* (N.D. TEX., 3:23-CV-01805, FILED AUG. 12, 2023)**

Filed on behalf of a class of persons who purchased Applied Digital securities between April 13, 2022, and July 26, 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) Applied Digital had overstated the profitability of its datacenter hosting business and its ability to successfully transition into a low-cost AI Cloud services provider; (ii) Applied Digital's Board of Directors was not independent within the meaning of NASDAQ listing rules; (iii) accordingly, Applied Digital had overstated the efficacy of its business model and failed to maintain proper corporate governance standards; (iv) the foregoing, once revealed, was likely to subject the Company to significant financial and/or reputational harm; and (v) as a result, the Company's public statements were materially false and misleading at all relevant times."

***LUMEN TECHNOLOGIES* (W.D. LA., 3:23-CV-01290, FILED SEPT. 15, 2023)**

Filed on behalf of a class of persons who purchased Lumen securities between March 11, 2019, and July 14, 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) Lumen owned and/or still owns thousands of miles of cables wrapped in lead, a known neurotoxin, within the U.S.; (ii) the foregoing has harmed and posed the risk of further harming the environment, exposed Company employees, and the general public, thereby posing a significant public health risk and environmental pollution risk; (iii) Lumen was on notice about the damage and risks presented by these lead-covered cables but did not disclose them as a potential threat to everyday people and communities, as well as failed to provide adequate lead training to employees; (iv) all the foregoing subjected the Company to a heightened risk of governmental and regulatory oversight and enforcement action, as well as legal and reputational harm; and (v) as a result, the Company's public statements were materially false and misleading at all relevant times."

Securities Class Action Settlements

***EXELA TECHNOLOGIES* (N.D. TEX., 3:20-CV-00691)**

$5 million settlement of case asserting claims under the Securities Exchange Act of 1934.

Case initially filed on March 23, 2020. After dismissing an earlier version of the complaint, Judge Fitzwater denied Defendants' motion to dismiss on January 21, 2022. Case resolved during discovery prior to the completion of briefing on Plaintiffs' motion for class certification. Motion for preliminary approval of settlement filed on July 27, 2023.

***BERRY CORPORATION* (N.D. TEX., 3:20-CV-03464)**

$2.55 million settlement of case asserting claims under the Securities Act of 1933 and Securities Exchange Act of 1934.

Case initially filed on November 20, 2020. Judge Scholer denied Defendants' motion to dismiss on September 13, 2022, and Defendants' motion for reconsideration on November 9, 2022. Case resolved during discovery following completion of briefing on Plaintiffs' motion for class certification. Motion for preliminary approval of settlement filed on September 18, 2023.

Decisions of Note

Digital Turbine: W.D Tex. Dismisses Restatement Case for Failure to Plead Scienter

Yoshikawa v. Exxon: N.D. Tex. Allows Scheme Liability Claims to Proceed Despite Dismissing False Statement Claims

Natera: W.D. Tex. Allows Claims Based on One of Two Products to go Forward Against Genetic Testing Company

Southwest Airlines: N.D. Tex. Dismisses Challenges to Safety-Related Statements

Camber Energy: S.D. Tex. Dismisses Claims Alleging Inadequate Disclosures Related to Sales of Unregistered Securities

Ramirez v. Exxon: N.D. Tex. Finds Defendants Successfully Showed Lack of Price Impact and Denies Class Certification In Part

Cabot Oil & Gas: S.D. Tex. Certifies a Class After Closely Analyzing Price Impact and Competing Expert Analyses

Other Cases of Note: The Fifth Circuit Accepts a 23(f) Appeal, Class Certification Arguments Continue in *McDermott International*, and Court Rulings in Non-Class Securities Cases and Shareholder Derivative Cases

In re Digital Turbine, Inc. Sec. Litig., No. 1:22-CV-550 (W.D. Tex. July 19, 2023)

- Judge Ezra granted Defendants' motion to dismiss with leave to amend.
- After Digital Turbine restated certain financial statements following a review of accounting policies used by two acquired companies, Plaintiffs challenged the company's pre-acquisition statements about anticipated revenue and post-acquisition reports of revenue.
- The court found that certain pre-acquisition statements were "non-actionable puffery," not false when made, and likely protected by the PSLRA safe harbor for forward-looking statements.
- As for the revenue-related statements and reports, the court found that Plaintiffs failed to adequately plead scienter. The existence of a restatement/violations of generally accepted accounting principles did not itself suggest any culpable intent. The alleged failure by one of the acquired companies to follow its own accounting policy did not suggest scienter absent allegations that Defendants knew the policy was allegedly being disregarded. The nature of the accounting errors also did not suggest scienter given the "difficulty of applying" the rule and prior clean audits by "Big 4" accounting firms. Non-suspicious stock sales by insiders and non-extraordinary performance-based compensation plans also did not contribute to any inference of scienter.
- The fare more compelling inference was that Digital Turbine discovered and addressed the issue after a more fulsome post-acquisition review of the acquired companies' accounting.

Yoshikawa v. Exxon Mobil Corp., No. 3:21-CV-00194, 2023 WL 5489054 (N.D. Tex., Aug. 24, 2023)

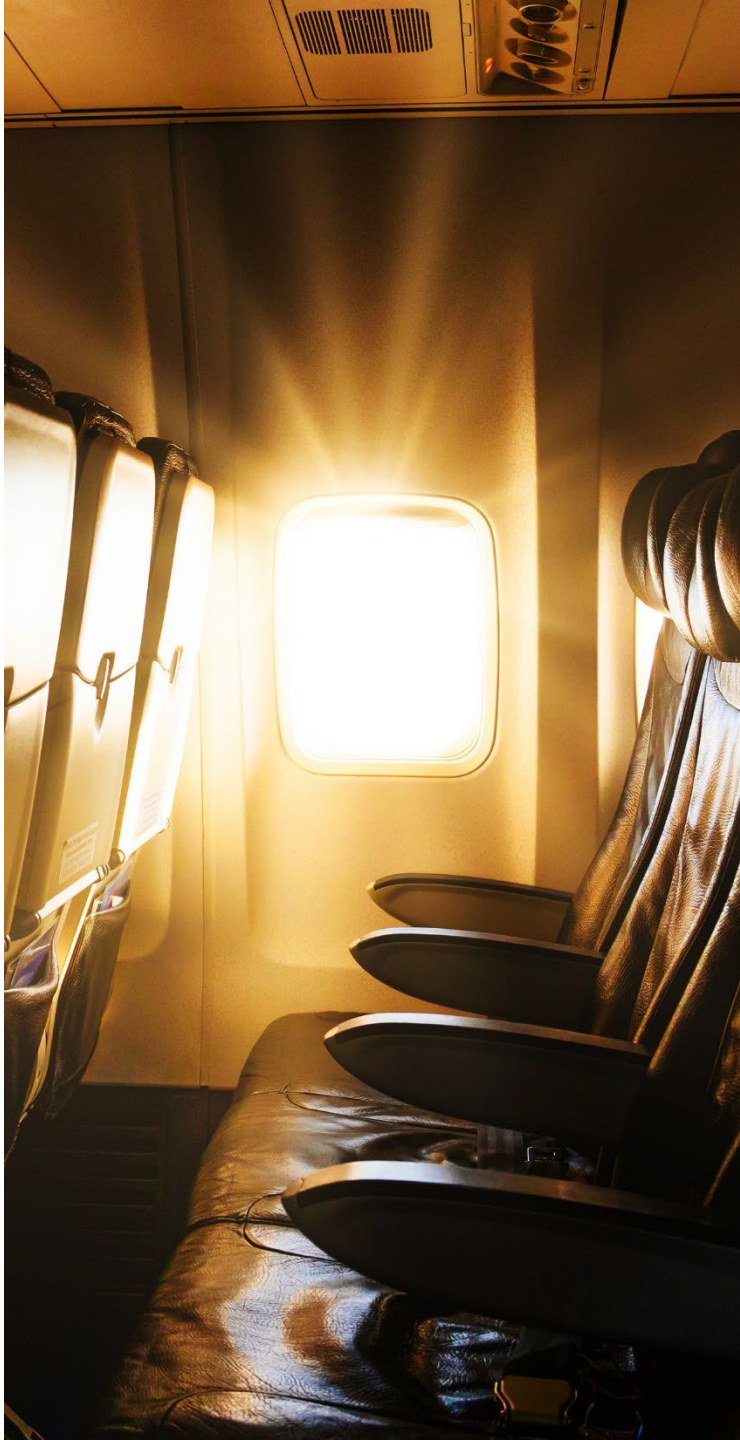
- Judge Godbey granted-in-part and denied-in-part Defendants' motion to dismiss.
- Plaintiffs claimed that Exxon portrayed its oil and gas assets in the Permian Basin as more valuable than they were, relying primarily on allegations that employees were told to use "impossible drilling assumptions" and the alleged "treatment of two whistleblowers."
- The court dismissed the claim that Exxon made false or misleading statements, finding that Plaintiffs failed to adequately plead scienter. Plaintiffs did not identify when the individual defendants who made the statements became aware that the assumptions were allegedly overly optimistic or not legitimately prepared. Nor did the timing of the termination of the alleged whistleblowers, occurring after disclosure of lower capacity in the Permian, suggest retaliation.
- The court found, however, that Plaintiffs adequately alleged a "scheme liability claim" against an employee who did not make public statements, based on her alleged instructions to her team to manipulate internal valuations to support the company's public statements to investors. The claim against that employee also supported a scheme liability claim against Exxon, which in turn supported a control person claim against an individual defendant.

Schneider v. Natera, Inc., No. 1:22-CV-398, 2023 U.S. Dist. LEXIS 160171 (W.D. Tex. Sept. 11, 2023)

- Judge Ezra granted-in-part (with leave to replead) and denied-in-part Defendants' motion to dismiss.
- Plaintiffs claimed that Natera made false and misleading statements about the clinical superiority of its kidney transplant rejection test through misleading comparisons to a clinical study of CareDx's competing test. They also claimed Natera cultivated a misleading impression that increased revenue from its prenatal test was the result of organic demand when it was allegedly driven by deceptive and improper business practices.
- The court found that Plaintiffs' complaint failed to adequately explain why the statements about the kidney transplant rejection test were misleading. While Plaintiffs alleged that the study of Natera's test differed from the study of CareDx's product, that did not, in the court's view, sufficiently explain why the comparison was misleading. The court allowed Plaintiffs to replead these claims.
- As for the statements about the prenatal test, the court found that Plaintiffs adequately alleged that it was misleading for Natera to conceal that its revenues were inflated by deceptive business practices. Based on a variety of factors, including the importance of the product to Natera and insider stock sales, the court also found a strong inference of scienter as to some of the individual defendants.

Linenweber v. Sw. Airlines Co., No. 3:20-CV-00408, 2023 WL 6149106 (N.D. Tex. Sept. 19, 2023)

- Judge Kinkeade granted Defendants' motion to dismiss with leave to amend.
- Plaintiffs claimed that statements by Southwest Airlines about its commitment to safety and regulatory compliance were false or misleading.
- The court found that many of the challenged statements about safety standards are "aspirational puffery" that are not actionable because they would not mislead a prospective investor.
- The remaining challenged statements were not adequately alleged to be false and misleading because the facts alleged by Plaintiffs were not inconsistent with the statements. The court also found that Plaintiffs failed to plead scienter. Allegations about the individual defendants' roles did not show awareness of the specific safety and compliance issues that later occurred. Nor were those issues of such a magnitude and importance as to give rise to an inference that executives must have known about them.
- The court also dismissed Plaintiffs' "scheme liability" claim because they "d[id] not identify any fraudulent or deceptive acts by Defendants other than purportedly misleading statements," the challenge to which the court had already found to be insufficient.



Coggins v. Camber Energy Inc., No. 4:21-cv-03574, 2023 WL 6202056 (S.D. Tex. Sept. 22, 2023)

- Judge Eskridge granted Defendants' motions to dismiss.
- Plaintiffs claimed that Camber had a duty to disclose unregistered sales of securities and the dilution of Camber common stock as a result of a buyer's conversion and sale of convertible securities.
- The court found that Camber disclosed the information required by the relevant SEC rules and that disclosure of the additional information identified by Plaintiffs was not required.
- The court also found that the buyer's later sales of unregistered securities without disclosure did not constitute a deceptive or manipulative act because the sales were exempt from registration and there was otherwise no duty of disclosure.

Ramirez v. Exxon Mobil Corp., No. 3:16-CV-03111, 2023 WL 5415315 (N.D. Tex. Aug. 21, 2023)

- Judge Kinkeade granted-in-part and denied-in-part Plaintiff's motion for class certification.
- Plaintiff alleged that Defendants made misstatements regarding Exxon's (i) use of a proxy cost of carbon representing the projected effects of various climate-related policies on the future global energy demand, (ii) proved reserves and potential need for a de-booking related to a Canadian bitumen operation and (iii) alleged need to take an impairment related to a dry gas operation.
- The court found that Defendants successfully rebutted the fraud on the market presumption of reliance with respect to alleged misstatements about the proxy cost of carbon by demonstrating that the allegedly corrective information on that subject did not have a statistically significant impact on Exxon's stock price. In so ruling, the court agreed with Defendants' expert on disputed issues related to the proper time window for measuring the price impact of publicly-released information.
- As to the other categories of alleged misstatements, the court found that Defendants did not prove a lack of price impact in light of a statistically significant stock price decline following its announcements of a potential de-booking of reserves.
- Based on its ruling, the court denied the motion for class certification "to the extent it seeks to certify claims regarding Defendants' alleged misstatements about carbon proxy costs" and certified a class with respect to the remaining claims, after shortening the putative class period to reflect the certified claims.

Del. Cnty. Emps. Ret. Sys. v. Cabot Oil & Gas Corp., No. H-21-2045, 2023 WL 6300569 (S.D. Tex. Sept. 27, 2023)

- Judge Rosenthal granted Plaintiffs' motion for class certification.
- Plaintiffs alleged that Defendants made misrepresentations regarding Cabot's compliance with certain environmental laws and related regulatory inquiries.
- The court found that Defendants failed to prove the absence of price impact, in part by delving into technical disagreements between the parties' experts regarding methodological differences in their competing event studies.
- The court also carefully analyzed whether there was a mismatch between certain alleged misstatements and certain alleged corrective disclosures, finding no mismatch as to some and a mismatch as to the company's update of its production growth guidance that Plaintiffs claimed was corrective of earlier misstatements.

Other Decisions of Note

Anadarko Petro v. GA Firefighters' Pension, No., 23-90022 (5th Cir. Aug. 30, 2023): The Fifth Circuit granted Anadarko's Rule 23(f) petition seeking leave to appeal the district court's certification of a class, raising issues regarding the sequencing of submission of expert reports and price impact issues.

Burback v. Brock, No. 22-40609, 2023 WL 4532803 (5th Cir. July 13, 2023): Fifth Circuit affirmed dismissal of non-class securities claims on statute of repose and scienter grounds.

Edwards v. McDermott Int'l Inc., 4:18-cv-04330, 2023 WL 5916598 (S.D. Tex. Sept. 15, 2023), *R & R rejected*, 2023 WL 6388552 (Sept. 30, 2023): Plaintiffs objected to Magistrate Judge Edison's recommendation that Plaintiffs' motion for class certification be denied because Plaintiffs lacked standing to assert a Section 14(a) claim and due to a mismatch between the claim and Plaintiff's damages theory. Judge Hanks rejected the recommendation and denied class certification without prejudice to Plaintiffs' motion being reasserted with briefing focused solely on the requirements of Rule 23(a) and (b)(3).

Sobel v. Thompson, 1:21-CV-272, 2023 WL 4356066 (W.D. Tex. July 5, 2023): Judge Pitman dismissed a derivative complaint brought on behalf of SolarWinds based on a Delaware forum selection clause in the company's certificate of incorporation.

Tredinnick v. Transamerica Life Ins. Co., No. 4:22-cv-00423, 2023 WL 4424609 (E.D. Tex. July 10, 2023): Judge Mazzant granted Defendant's motion to dismiss on statute of repose grounds in a non-class case alleging Exchange Act violations related to variable annuity accounts.

In re Tesla Inc. S'holders Deriv. Litig., No. 1:22-CV-00592, 2023 WL 6060349 (W.D. Tex. Sept. 15, 2023): Considering objections to a magistrate judge recommendation, Judge Ezra dismissed a derivative complaint for failure to adequately plead demand futility.

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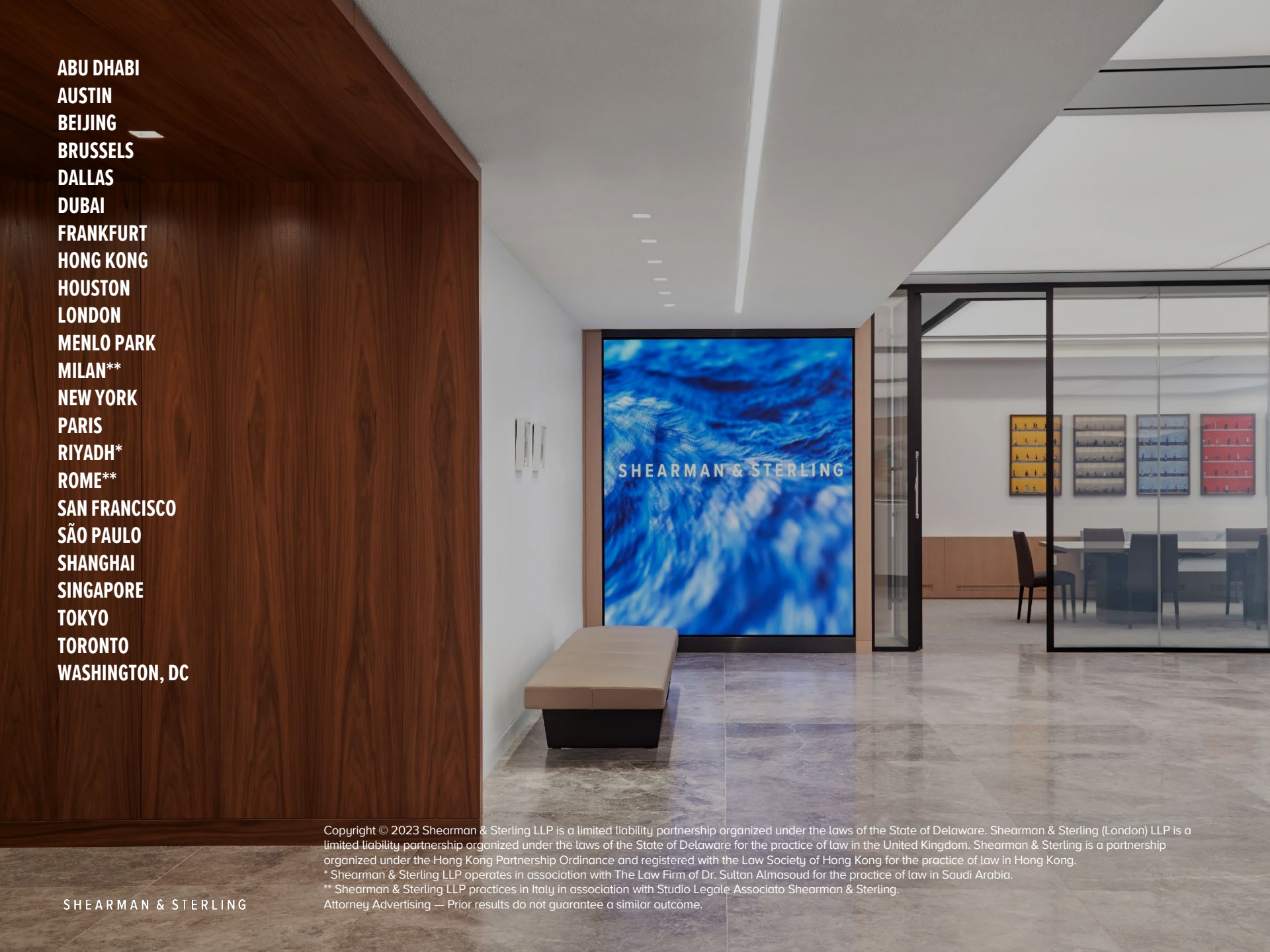

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