

The background of the image is the exterior of a grand, classical-style building. The facade is made of light-colored stone blocks. Above a series of arched doorways, the words "JOHN MINOR WISDOM UNITED STATES COURT OF APPEALS BUILDING" are carved into the stone. Below "JOHN MINOR WISDOM", the words "FIFTH CIRCUIT" are also visible. The architecture features decorative balustrades on the upper level.

Fifth Circuit Securities Litigation Quarterly

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SHEARMAN & STERLING

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Introduction

Welcome to the inaugural 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 Q1 2023 edition, we cover new case filings and decisions of note, including multiple Court of Appeals and district court decisions on motions to dismiss and a decision denying relief from the PSLRA automatic stay of pre-motion to dismiss discovery.

New Securities Class Action Filings



SOUTHWEST AIRLINES (S.D. TEX., 23-CV-00115, FILED JAN. 12, 2023)

Filed on behalf of a class of persons who purchased publicly traded Southwest Airlines securities between June 13, 2020, and December 31, 2022

Asserts claims under the Securities Exchange Act of 1934

Alleges defendants “made false and/or misleading statements and/or failed to disclose that: (1) Southwest Airlines continuously downplayed or ignored the serious issues with the technology it used to schedule flights and crews, and how it stood to be affected worse than other airlines in the event of inclement weather; and (2) it did not discuss how its unique point-to-point service and aggressive flight schedule could leave it prone in the event of inclement weather; and (3) 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.”



LUMEN TECHNOLOGIES (W.D. LA., 23-CV-00286, FILED MAR. 3, 2023)

Filed on behalf of a class of persons who purchased Lumen common stock between September 14, 2020, and February 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) various headwinds were impeding the Company’s ability to invest in and grow its Quantum Fiber brand; (ii) Quantum Fiber was not progressing as was represented to the investing public; (iii) Lumen’s management was reassessing its strategic priorities and had placed a hold on the plans to quickly scale up the Quantum Fiber brand; and (iv) as a result of Lumen’s decision to delay expansion of Quantum Fiber, the Company’s results and metrics were negatively impacted and the scaling up of Quantum Fiber would not occur until, at the earliest, the end of 2023.”

Decisions of Note

Six Flags: Fifth Circuit Credits Confidential Former Employee Allegations and Reverses Dismissal

Nobilis Health: Fifth Circuit Affirms Ruling that Allegations in Separate Third-Party Complaint Did Not Support ScienTer

FirstCash: N.D. Tex. Grants Motion to Dismiss

Concho Resources: S.D. Tex. Magistrate Judge Recommends Denial of Motion to Dismiss

Cassava Sciences: W.D. Tex. Denies Motion for Relief from PSLRA Stay of Discovery

Oklahoma Firefighter Pension and Ret. Sys. v. Six Flags Entertainment Corp.,
No. 21-10865, 2023 WL 228268 (5th Cir. Jan. 18, 2023)

- Fifth Circuit panel (Southwick, Haynes and Higginson) unanimously reversed district court’s dismissal.
- Plaintiff alleged that defendant theme park operator misled investors by projecting unrealistic or impossible timelines for opening theme parks in China.
- The district court had “significantly discounted” allegations attributed to an anonymous former employee about the Chinese development partner’s financial condition.
- On appeal, the court held that the allegations regarding the former employee sufficiently detailed his position as one whose responsibilities were “directly relevant to the events at issue” and corroborated by at least one photo, and therefore “should be discounted only minimally for his anonymity and lack of corroborating witnesses.”
- Based primarily on the former employee allegations, the court found that Plaintiff adequately pled a number of false or misleading statements and a strong inference of scienter (including “actual knowledge” that certain forward-looking statements were allegedly misleading).



Zhang Yang v. Nobilis Health Corp.,

No. 22-20224, 2023 U.S. App. LEXIS 5926 (5th Cir. Mar. 13, 2023)

- Fifth Circuit panel (Stewart, Dennis and Southwick) unanimously affirmed district court’s decision denying plaintiff’s request for relief from judgment under Fed. R. Civ. P. 60(b) due to “newly discovered evidence.”
- After dismissal for failure to plead scienter and while appeal of dismissal was pending, Plaintiff sought relief from judgment based on allegations in a separate complaint filed against Nobilis by a third party, which he claimed showed the company acted with scienter when allegedly misrepresenting its finances.
- The court analyzed prior precedent on “[w]hether a third-party’s pleadings constitute admissible evidence,” which “focuses on the way a plaintiff seeks to use the third-party pleadings and how the pleadings came into existence.” Here there was no applicable hearsay exception and plaintiff impermissibly sought to rely on “the accuracy of the facts” in the third-party complaint.
- Accordingly, the “district court did not abuse its discretion in denying [Plaintiff’s] motion because of his reliance on alleged evidence he obtained from a third-party complaint.”



Genesee County Employees' Ret. Sys. v. FirstCash Holdings, Inc.,
No. 4:22-cv-00033-P (N.D. Tex. Mar, 31, 2023)

- Judge Pittman granted defendants' motion to dismiss with prejudice.
- Plaintiffs alleged that defendant pawn broker/financial lender's public statements were rendered false and misleading based on allegations by Consumer Financial Protection Bureau that company violated prior consent order and Military Lending Act.
- Based on "the 'particular job descriptions' and 'individual responsibilities of the confidential witnesses in comparison with the allegations they make,'" the court determined whether to apply a "slight, moderate, or heavy" discount to the allegations.
- Closely comparing the company's public statements to allegations made by confidential witnesses, the court found some statements were adequately alleged to be misleading and others were not contradicted by the confidential witness claims.
- Scierer was not adequately pled, largely because of insufficient allegations that officers knew about alleged MLA violations. "[T]he allegedly misrepresented information on day-to-day transactions at the store-level would not be readily apparent to C-Suite executives absent some notice from management or compliance—which Plaintiff does not allege." The more compelling inference was "of a company that attempted to roll out an MLA compliance and training program that had holes in it—specifically, in middle management."
- Loss causation not pled because the CFPB's lawsuit contained "mere allegation[s]" and in the court's view "a corrective disclosure must be verifiably true to at least some small degree."

In re Concho Resources Inc., Sec. Litig.,
No. 4:21-cv-2473 (S.D. Tex. Feb. 23, 2023)

- Magistrate Judge Sheldon recommended denial of defendants’ motion to dismiss (objection to recommendation pending).
- 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.
- While allegations from two anonymous former employees were “generally discounted” as being “largely conclusory and speak[ing] to the conclusions of others” rather than firsthand information, the allegations as to the seven others were viewed as “substantiat[ing] that those [former employees] would have the necessary knowledge for minimally discounting their anonymity.”
- Overall, the court found that the former employees “corroborate” that defendants were “regularly and repeatedly warned of the risks,” which were “ignored and omitted from the company’s statements to the market.”
- A strong inference of “at least severe recklessness” was found based on former employee accounts of internal discussions or warnings about risks, the “importance” of the project to the company, and “circumstantial allegations regarding the Defendants’ participation in day-to-day activities.”
- Defendants’ proffered nonculpable inference of “hubris or overconfidence” viewed as “tend[ing] to support the inference that Defendants’ actions went beyond mere negligence.”

In re Cassava Sciences, Inc. Sec. Litig.,
No. 1:21-cv-00751 (W.D. Tex. Jan. 2, 2023)

- Magistrate Judge Hightower denied Plaintiffs’ motion for relief from PSLRA automatic stay of pre-motion to dismiss discovery to allow them to obtain documents Cassava produced in a separate stockholder derivative action and “documents, interviews, and information” Cassava provided to governmental agencies.
- Plaintiffs failed to show undue prejudice from the PSLRA stay of discovery.
- “Prejudice caused by the delay inherent in the PSLRA’s discovery stay cannot be ‘undue’ prejudice because it is prejudice which is neither improper nor unfair.”
- The fact that Plaintiffs are at an “informational disadvantage” as concurrent investigations or litigation move forward is not by itself sufficient to show that a plaintiff is unduly prejudiced.
- A plaintiff must “meaningfully explain *how* it will be unduly prejudiced, *why* it has a particular need for early discovery of this material, or *how* the specific documents and deposition testimony it seeks will actually prevent undue prejudice.”



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