

Fifth Circuit Securities Litigation Quarterly

Q3 2024



A&O SHEARMAN

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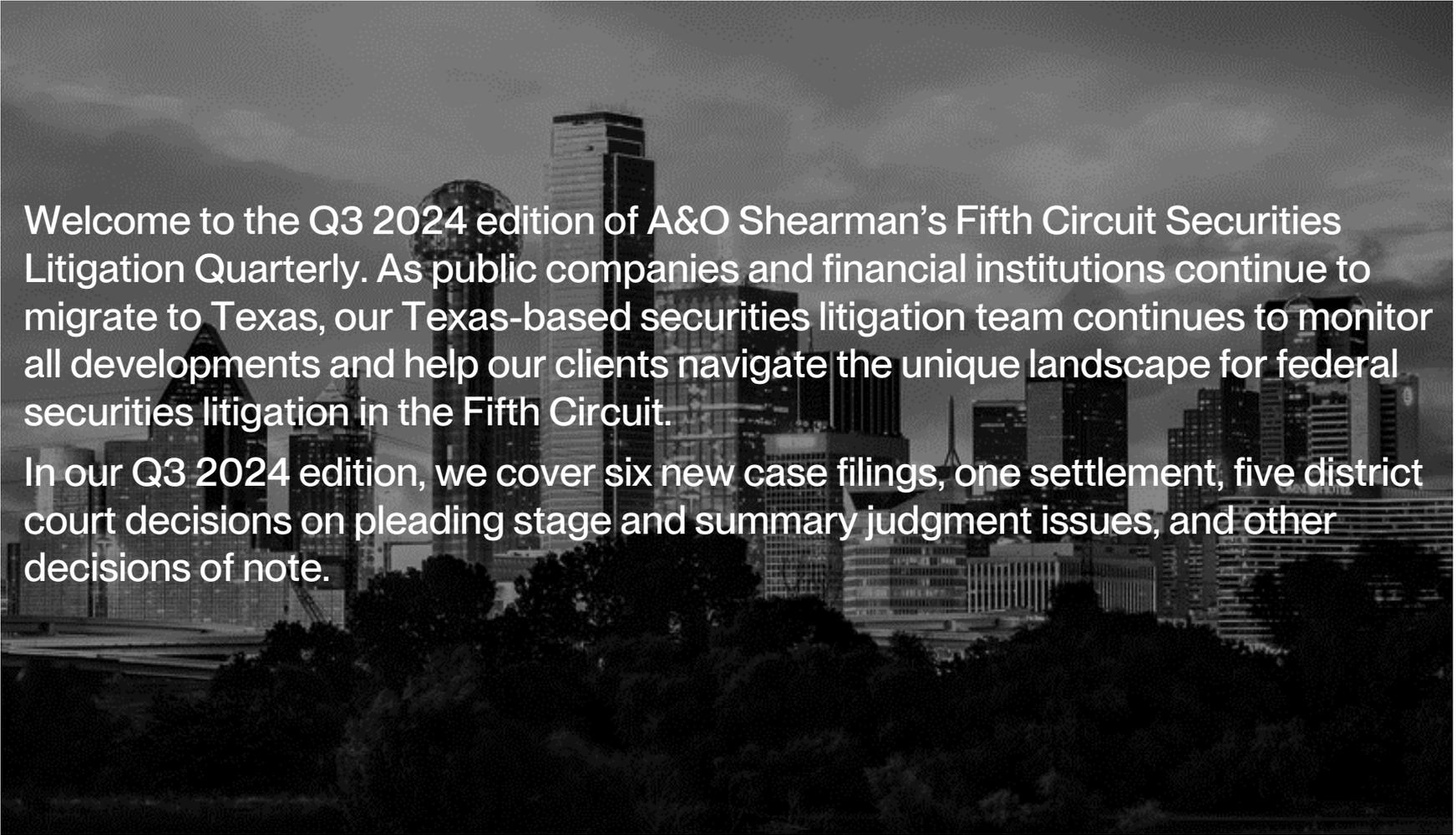
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Texas Securities Litigation
Ranked Band 1
Chambers USA

Introduction



Welcome to the Q3 2024 edition of A&O Shearman'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 Q3 2024 edition, we cover six new case filings, one settlement, five district court decisions on pleading stage and summary judgment issues, and other decisions of note.

New securities class action filings

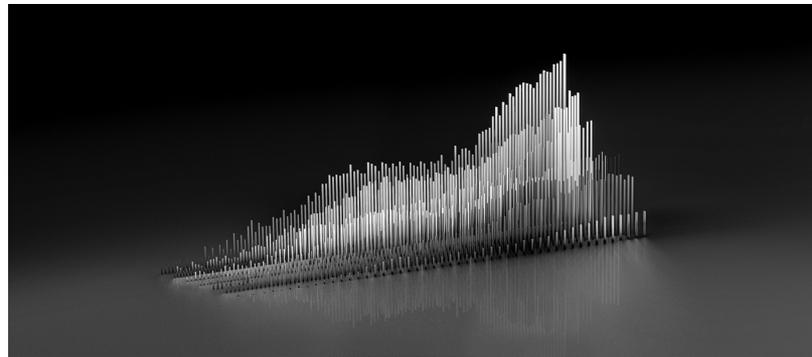


AMERICAN AIRLINES (N.D. TEX., 4:24-CV-00673, FILED JULY 18, 2024)

Filed on behalf of a putative class of persons who purchased American Airlines Group Inc. securities between January 25, 2024 and May 28, 2024

Asserts claims under the Securities Exchange Act of 1934

Alleges Defendants made “overwhelmingly positive statements to investors while, at the same time, disseminating materially false and misleading statements and/or concealing material adverse facts concerning the true state of American; notably, that the Company’s sales and distribution strategy was not driving the revenue projected. Instead, it was actually driving customers away from American as the strategy and its attested poor execution made it more difficult for customers to access the Company’s services.”



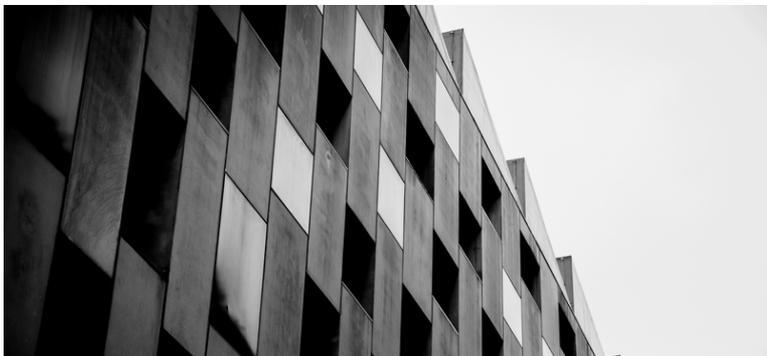
CROWDSTRIKE (W.D. TEX., 1:24-CV-00857, FILED JULY 30, 2024)

Filed on behalf of a putative class of persons who purchased CrowdStrike Holdings, Inc. common stock between November 29, 2023 and July 29, 2024

Asserts claims under the Securities Exchange Act of 1934

Alleges Defendants made false and/or misleading statements and/or failed to disclose that “(1) CrowdStrike had instituted deficient controls in its procedure for updating [its] Falcon [software platform] and was not properly testing updates to Falcon before rolling them out to customers; (2) this inadequate software testing created a substantial risk that an update to Falcon could cause major outages for a significant number of the Company’s customers; and (3) such outages could pose, and in fact ultimately created, substantial reputational harm and legal risk to CrowdStrike.”

New securities class action filings



XPEL (W.D. TEX., 5:24-CV-00873, FILED AUG. 8, 2024)

Filed on behalf of a putative class of persons who purchased XPEL Inc. securities between November 8, 2023 and May 2, 2024

Asserts claims under the Securities Exchange Act of 1934

Alleges Defendants made false and/or misleading statements and/or failed to disclose that “(i) XPEL’s competitors were siphoning an increasingly large segment of the market; (ii) as a result, the Company’s revenue growth became increasingly dependent upon existing customers and partners; (iii) as a result, the Company’s revenue growth for 2023 and 2024 dwindled; and (iv) as a result, Defendants’ positive statements about the Company’s business, operations, and prospects were materially misleading and/or lacked a reasonable basis.”



NEXT BRIDGE HYDROCARBONS (N.D. TEX., 4:24-CV-00767, TRANSFERRED AUG. 12, 2024)

Filed on behalf of a putative class of persons who acquired Next Bridge Hydrocarbons, Inc. shares in connection with the Company’s spin-off from Meta Materials, Inc. on December 14, 2022

Asserts claims under the Securities Act of 1933

Alleges that the registration statement in connection with the spin-off contained untrue statements of material fact and/or omitted to state material facts to make the statements therein not misleading concerning (i) “the value of [certain oil and gas] Assets”, (ii) the Company’s “ability to present accurate financial statements,” and (iii) “[i]nformation required under Item 404 of Regulation S-K concerning a related-party transaction involving certain [oil and gas] Assets.”

New securities class action filings



ORTHOFIX (E.D. TEX., 2:24-CV-00690, FILED AUG. 21, 2024)

Filed on behalf of a putative class of persons who purchased Orthofix Medical Inc. common stock between October 11, 2022 and September 12, 2023

Asserts claims under the Securities Exchange Act of 1934

Alleges that “Defendants issued false and misleading statements and/or failed to disclose adverse facts about the Company’s management team” and that Defendants “falsely assured the market that Orthofix’s management team consisted of individuals committed to conducting business in accordance with the highest ethical and legal standards, and further, that these individuals believed in and fostered a strong performance-based culture focused on integrity, collaboration, innovation, diversity, and corporate responsibility.”



BUMBLE (W.D. TEX., 1:24-CV-01131, FILED SEPT. 24, 2024)

Filed on behalf of a putative class of persons who purchased Bumble Inc. securities between November 7, 2023 and August 7, 2024

Asserts claims under the Securities Exchange Act of 1934

Alleges that Defendants “provided overwhelmingly positive statements to investors while, at the same time, disseminating materially false and misleading statements and/or concealing material adverse facts concerning Bumble’s relaunch strategy, including: Premium Plus and base tiers, focused engagement and more personalized experiences for younger users, and enhancing premium offerings for paid subscription members.”

New securities class action settlement

SIX FLAGS (N.D. TEX., 4:20-CV-00201)

\$40 million settlement of case asserting claims under the Securities Exchange Act of 1934

Case initially filed on February 12, 2020. In early 2021, the court granted Defendants' motion to dismiss with prejudice. The Fifth Circuit reversed the dismissal in early 2023. In June 2023, the court granted Defendants' motion for judgment on the pleadings and dismissed the action with prejudice. The Fifth Circuit again reversed the dismissal in April 2024. The case resolved during fact discovery. Motion for preliminary approval of settlement filed on September 3, 2024.



Decisions of note

BProtocol: W.D. Tex. Grants Motion to Dismiss Without Prejudice on Personal Jurisdiction and *Forum Non Conveniens* Grounds

Alta Mesa: S.D. Tex. Grants Summary Judgment in Part on Falsity Grounds as to Certain Statements and on Control Person Grounds as to Certain Defendants

Exxon: N.D. Tex. Denies Motion for Judgment on the Pleadings, Holding Plaintiffs Adequately Pled Reliance and Scierer as to the Alleged Scheme Claim

Digital Turbine: W.D. Tex. Grants Motion to Dismiss with Prejudice on Grounds of Scierer, Loss Causation, and Failure to Plead a Basis for Scheme Liability

Lumen Technologies: W.D. La. Magistrate Recommends Granting Motion to Dismiss with Prejudice on Falsity and Scierer Grounds

Other Cases of Note: Fifth Circuit Grants Interlocutory Review of Class Certification Order in *McDermott* Case; S.D. Tex. Dismisses Shareholder Derivative Suit with Prejudice Following a Special Committee's Investigation

Basic v. BProtocol Foundation, 2024 WL 4113751 (W.D. Tex. July 31, 2024), *adopted*, 2024 4113024 (W.D. Tex. Sept. 6, 2024)

- ◆ Magistrate Judge Lane recommended granting defendants' motion to dismiss without prejudice, and Judge Pitman adopted the recommendation.
- ◆ The plaintiffs alleged they lost money in an online crypto asset exchange run by the defendants. The plaintiffs brought claims for the alleged sale of unregistered securities in violation of the Securities Act and securities fraud in violation of the Exchange Act.
- ◆ The court held that the plaintiffs failed to allege sufficient facts to establish personal jurisdiction over the defendants in the United States.
- ◆ The court also held that the plaintiffs failed to sufficiently plead that the investments at issue were subject to the federal securities laws under the Supreme Court's *Morrison* decision because the plaintiffs did not show that irrevocable liability or title passed within the United States. Accordingly, the court also dismissed under the doctrine of *forum non conveniens*, holding that plaintiffs would have to pursue their claims in Israel.



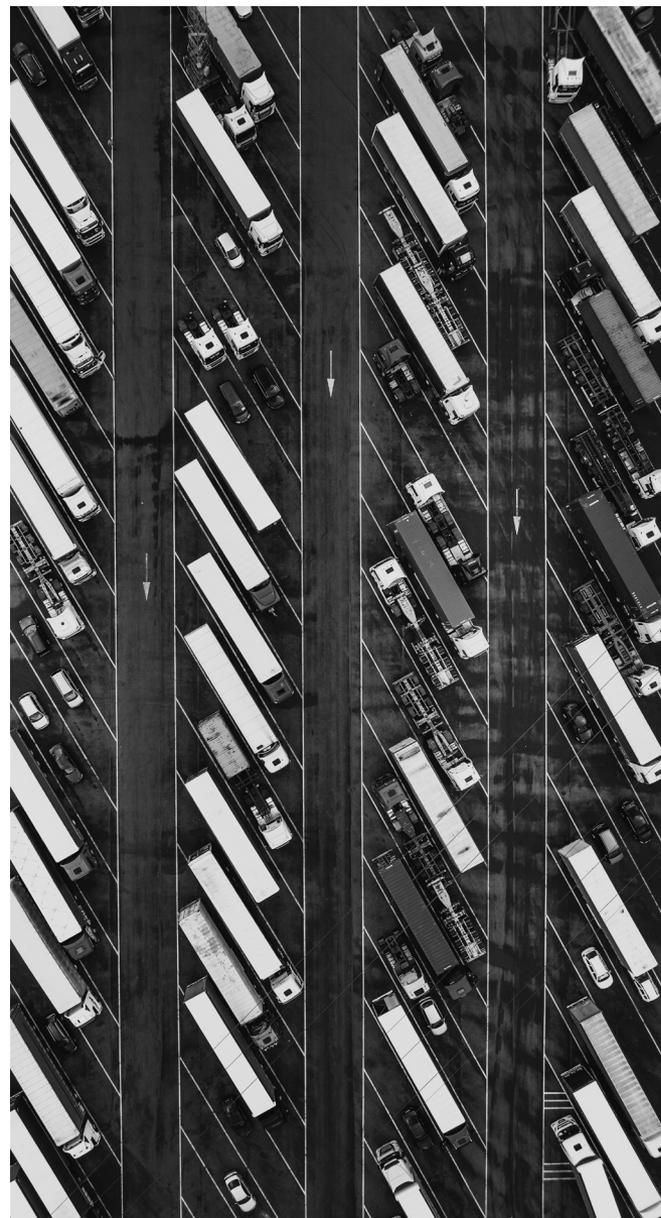
In re Alta Mesa Res., Inc. Sec. Litig., 2024 WL 3760481 (S.D. Tex. Aug. 12, 2024)

- ◆ In a certified class action, Judge Hanks granted defendants' motions for summary judgment in part and denied the parties' *Daubert* motions.
- ◆ All claims arising out of Alta Mesa's March 29, 2018 Form 10-K were dismissed with prejudice. Control person claims against several defendants were also dismissed with prejudice.
- ◆ The plaintiffs failed to raise a triable issue of fact as to any of the challenged statements in the 10-K. The court held that (i) a risk disclosure did not present as a risk an event that had already transpired, (ii) other risk factors did not frame "as merely hypothetical" risks that "had a near certainty of causing financial disaster to the company," (iii) Alta Mesa had no duty to disclose existing internal control deficiencies at the time of the 10-K, and (iv) Alta Mesa's statement that its disclosure controls and procedures were effective was not false or misleading.
- ◆ The court also determined that plaintiffs failed to raise a triable issue of fact for their control person claims against several defendants, emphasizing that status alone cannot establish control and the necessity to prove some facts beyond a defendant's position or title to demonstrate actual power or control concerning the specific transactions at issue.



Yoshikawa v. Exxon Mobil Corp., 2024 WL 3802997 (N.D. Tex. Aug. 12, 2024)

- ◆ Judge Godbey denied defendants' motion for judgment on the pleadings.
- ◆ The court had previously granted-in-part defendants' motion to dismiss, dismissing the false statement claims and allowing a scheme liability claim to survive on the theory that an individual defendant employee manipulated learning curve assumptions included in ExxonMobil's 2019 development plan, which purportedly increased Exxon's proved reserves.
- ◆ Defendants filed a motion for judgment on the pleadings, arguing that plaintiffs failed to adequately allege (i) that the purportedly deceptive conduct was "in connection with the purchase or sale of any security," (ii) reliance on the allegedly deceptive conduct, or (iii) scienter on the part of the company.
- ◆ The court found that it was sufficiently alleged at the pleading stage that the purportedly manipulated data was incorporated into the company's publicly reported reserves, thereby satisfying the requirement of a connection with the purchase or sale of a security.
- ◆ With respect to the element of reliance, the court similarly reasoned that the allegations that the scheme was communicated to the public sufficed to invoke the fraud-on-the-market presumption. The court also held that the plaintiffs had adequately alleged entitlement to the *Affiliated Ute* presumption of reliance based on nondisclosure of the alleged scheme.
- ◆ Finally, the court held that the employee's alleged scienter could be imputed to the company because she purportedly furnished false information for inclusion in the company's public statements.



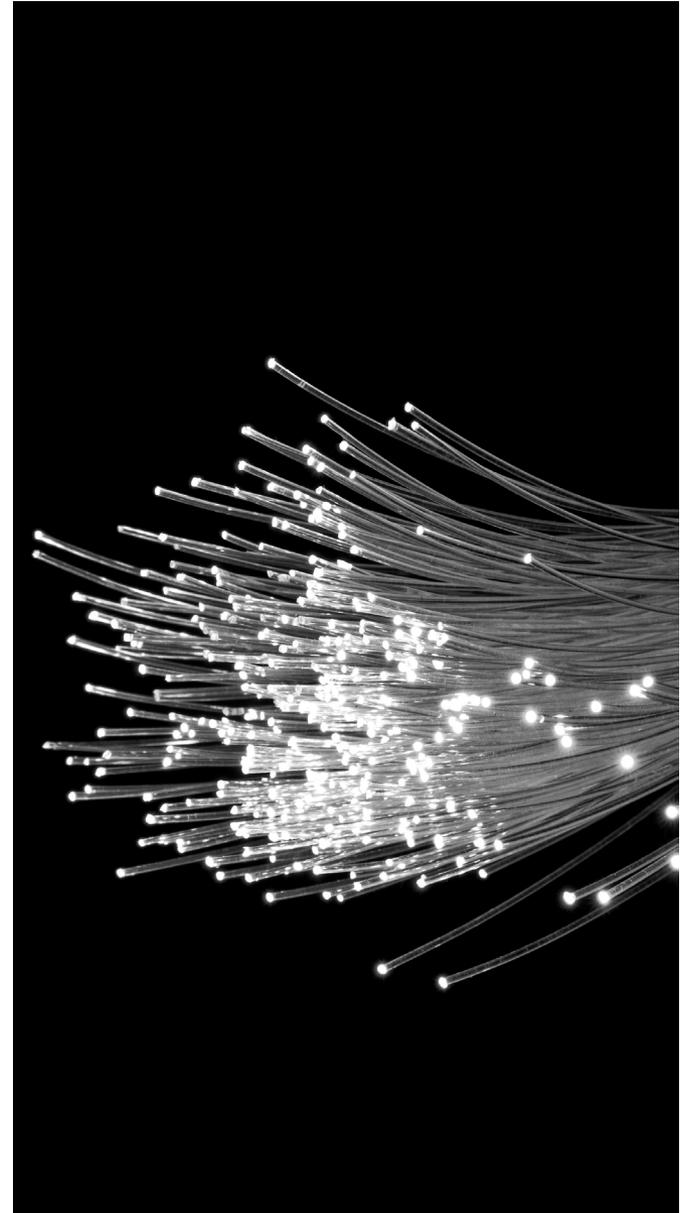
In re Digital Turbine, Inc. Sec. Litig., 2024 U.S. Dist. LEXIS 150473 (W.D. Tex. Aug. 22, 2024)

- ♦ Judge Ezra granted defendants' motion to dismiss with prejudice.
- ♦ The court had previously granted a motion to dismiss with leave to amend.
- ♦ Plaintiffs alleged that Digital Turbine made false or misleading statements related to its acquisitions of two companies and financial statements that the company later restated.
- ♦ The court held that plaintiffs failed to allege scienter, as the amended complaint did not correct the prior complaint's deficiencies. Plaintiffs also failed to plead loss causation as to one of the alleged corrective disclosures.
- ♦ The scienter allegations about (i) a change in accounting policy, (ii) defendants' alleged motive to defraud based on stock sales, (iii) executive compensation, and (iv) the company's core operations, were insufficient to state a claim.
- ♦ The court also rejected a new scheme liability claim, finding an absence of "specific, particularized factual allegations that identify the scheme or the specific actions Defendants took in furtherance of the scheme."



In re Lumen Techs., Inc. Sec. Litig., 3:23-cv-00286 (W.D. La. Sept. 30, 2024)

- ◆ Magistrate Judge McClusky recommended that defendants' motion to dismiss be granted in its entirety.
- ◆ Plaintiffs alleged that Lumen and individual defendants made false or misleading statements about the company's planned fiber rollout, allegedly failing to disclose insufficient technicians, a backlog of necessary materials, and a low yield of fiber buildout.
- ◆ Following an extensive analysis, the court held that plaintiffs failed to allege a material misrepresentation or omission. Rejecting as insufficient allegations attributed to "confidential witnesses," the court concluded that "Plaintiffs simply are engaged in Monday-morning-quarterbacking, i.e., impermissibly trying to prove fraud by hindsight."
- ◆ The court further found that plaintiffs failed to plead a strong inference of scienter, rejecting plaintiffs' arguments under the "core operations" theory, based on executive departures, and the generic motive to deliver results.



Other decisions of note

Nova Scotia Health Employees' Pension Plan v. McDermott Int'l, Inc., No. 24-90018 (5th Cir. July 26, 2024): Fifth Circuit grants both plaintiffs' and defendants' Rule 23(f) petitions seeking leave to appeal aspects of class certification decision addressing, among other issues, alleged intra-class conflicts.

Silverman v. Christmann, 4:23-cv-00636 (S.D. Tex. Sept. 11, 2024): Judge Bennett grants motion to dismiss for failure to plead that a shareholder demand was wrongfully refused, finding that plaintiff failed to show that the Special Committee's process was unreasonable.

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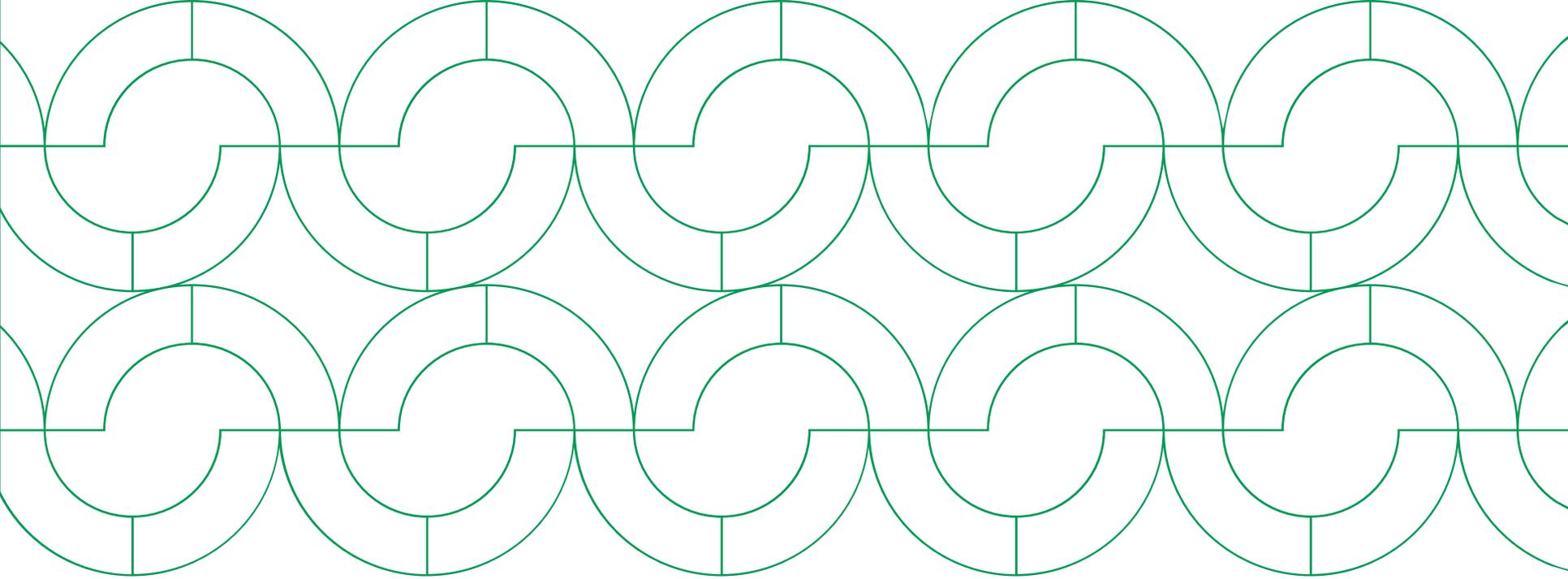
Texas *Litigation: Securities*



Band 1

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“They offer 100% value for the service provided.”



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