No. 17-41022

19-5113

In The

Supreme Court of the United States

Ë

Sameer P. Sethi, *Petitioner,*

v.

Securities and Exchange Commission, *Respondent.*

Ë

On Petition for Writ of Certiorari
United States Court of Appeals
for the Fifth Circuit

Ë

PETITION FOR WRIT OF CERTIORARI

Ë

Sameer P. Sethi
Pro Se

I. Questions Presented

A. Did the District Court err in concluding on the record—and did the Appellate Court err in affirming—that the Defendant and his company lacked a business history with major oil companies (especially where judicial notice of the relationship may have even existed)?

B. So, even if Defendant and his company worked with major oil companies, could someone try to argue that Defendant's marketing materials used certain grammar or word choice (e.g. "like" and "as") in an inappropriate or misleading way?

C. Even if (somehow) the District Court was not able to verify that Sethi Petroleum's claims about its relationships with major oil companies were truthful, did the District and Appellate Courts violate Defendant Sethi's 7th amendment constitutional rights by issuing summary judgment and refusing to let the issue proceed to trial?

D. Did the lower court violate Defendant's 7th amendment rights by affirming a summary judgment that there was scienter on the part of the Defendant, despite the complete reliance on (thought to be) attorney (general counsel) and CFO for the company?

E. Could the investments offered by the Defendant's company, really have been verifiably determined to be securities, and, accordingly, that they offered investors negligible management/governance powers?

F. Even to the extent investments offered by Defendant's company appeared that they may have had characteristics of securities (e.g., alleged indications that investors' management voice might be limited), it may have been premature to be able to determine the management dynamic and governance influence of investors in this (still-capitalizing) nascent entity—and hence if the investments in this entity were actually securities?

G. Did the SEC violate its investor protection mandate by causing to shut down, on an unsubstantiated claim, Defendant's company, Sethi Petroleum LLC, a company that would have likely helped its investors conduct oil and gas business to their benefit (especially where the SEC caused this shutdown without recognizing the Defendant and his company's successful track record when dealing with investors)? Even if the SEC thought there to be some fault with Defendant or his company, would it have been more appropriate and in the best interest of the investors for the SEC to have sought alternate resolutions?

H. Was Defendant--stripped of his assets by the receiver and unable to afford access to evidence or legal counsel experienced in federal securities litigation--ever in a position to properly defend himself? Was the counsel representing Defendant negligent in his representation in matters of this case?

I. Even if Sethi Petroleum LLC had made some misrepresentation in the sale of securities, should Sameer Sethi have been personally found to be liable, especially given Sethi Petroleum LLC's status as a distinct limited liability company and the good faith reliance on thought-to-be attorney (general counsel)?

J. Do current SEC guidelines, *or the existing law as a whole*, provide sufficient guidance as to what constitutes a security (especially as regards the *Williamson* factors test) and what elements would, if they exist, preclude an investment from being characterized as a security? If not, should the law, particularly the existing case law, be revised?

II. Table of Contents

Appendixes

III. Table of Authorities

CASES

IV. List of Parties

Key Parties

Securities and Exchange Commission is a Plaintiff and is the Appellee in the Court of Appeals. (The SEC is presently the Respondent before the Supreme Court.)

Sameer P. Sethi and Sethi Petroleum LLC are the Defendants in the District Court. Sameer P. Sethi is also Appellant in the Court of Appeals. (Sameer P. Sethi is presently the Petitioner before the Supreme Court.)

Other Parties

i. Marcus Helt is the Receiver in the case appointed by the District Court and remained the Receiver during the appeal in the Court of Appeals (and continues to be the receiver today).
ii. David Meisenbach is an Interested Party (a non-NDDF investor)
iii. Praveen Sethi is an Interested Party (creditor To Sethi Petroleum LLC)
iv. Shahnaz Sethi is an Interested Party (wife of Praveen Sethi; no direct affiliation to Sethi Petroleum LLC)
v. Jesse R. Castillo is an Interested Party (Defendant is unaware of his significance in the case)

The following were intervenor parties in the District Court, but not direct parties in the appeal: American National Bank of Texas.

The following were interpleader parties in the District Court, but not direct parties in the appeal: Sambina Homes, Ltd., Sambina Brookview Center, Sambina Properties, Ltd., Sambina Trust, Praveen Sethi, P.S.S.B. Investments, LLC, Sethi Tax & Wealth Management, Inc., Shana Investments, LLC, Goku Investments, Inc.

John Weber was a respondent in the District Court pursuant to an order of Contempt, but he was not a party in the case otherwise, nor was he a part in the appeal in the Court of Appeals.

V. Opinions

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at United States Court of Appeals for the Fifth Circuit, Dec 04, 2018, 910 F.3d 198; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix to the petition and is

[ ] reported at _____ ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix ___ to the petition and is

[ ] reported at _____ ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

VI. Jurisdiction

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____December 4, 2018_____.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____ , and a copy of the order denying rehearing appears at Appendix _____ .

[ ] An extension of time to file a petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A .

[X] The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____ .

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file a petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

[ ] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

VII. Statement and Overview of the Case

Prior to the commencement of the action taken by the Plaintiff, the Securities and Exchange Commission (SEC), on May 14, 2015, Petitioner, Sameer P. Sethi (referred to in this document as "Defendant" or "Defendant Sethi") and his company, Sethi Petroleum LLC (referred to as "Company"), were engaged in starting a new partnership composed of diverse people interested in joining the beginning stages of an oil and gas joint venture. This nascent partnership was known as the Sethi North Dakota Drilling Fund-LVIII Joint Venture (referred to as "NDDF"). At the time of the SEC's action the NDDF had not even reached the halfway point of its intended capitalization of ten million dollars. In addition to being far from being fully capitalized, the partnership was weathering a historic downturn in the price of oil. This downturn made it both difficult to raise capital for the new partnership and economically unviable to drill new oil wells. Furthermore, the NDDF was in its beginning stages such that no serious business activity could have been conducted by its partners yet. At this early stage in the NDDF'S life cycle, the partnership had only executed one acquisition with Irish Oil and Gas company. This acquisition allowed the partners of the NDDF to become working interest partners in the development of new and future wells that were being drilled and operated, in North Dakota by Crescent Point Energy U.S. Corp., Oxy USA Inc., and Slawson Exploration Co. All of these were and still are major oil companies, the first two being publicly traded corporations.

Ignoring the fact that the NDDF's was not fully capitalized, the economic downturn of the oil and gas markets at the time, and the early stage of the NDDF's life cycle, the SEC, based on a selective reading of the NDDF's partnership documents and a biased interpretation of how the Court determines whether investments are partnerships or securities, sought summary judgment against the Defendant. The SEC failed to acknowledge exculpatory portions of the NDDF's partnership documents and/or misinterpreted them. They further decontextualized citations which later resulted in the formation of inaccurate and inequitable conclusions, which lead the SEC to file an action seeking to prosecute the Defendant for violating the antifraud provisions of federal securities law, namely Section 17(a) of the Securities Act of 1933 ("Securities Act"); Sections 10(b), 20(a), and 20(b) of the Securities Exchange Act of 1934 ("Exchange Act"); and Rule 10-b promulgated under Section 10(b) of the Securities Exchange Act of 1934. The SEC relied on unsubstantiated and conclusory statements concerning the nature of the NDDF, in a haphazard attempt to claim that the NDDF was a security and that fraud had been committed.

After a hasty investigation and commencement of this action, the SEC was authorized to seize all critical evidence and documents from Defendant Sethi and his company that could have later been used to exonerate them. The SEC, pushing and convincing the court to initiate a receivership against both Defendant Sethi's company and Defendant Sethi personally, also seized the Defendant's and the Company's assets and financial resources -- the receivership rendered Defendant Sethi homeless (and forced to move in with family) and unable to hire competent counsel to represent him in the matter of this case. These haphazard and drastic actions in the case SEC v. Sethi became allegorical to the story of David (Sethi) and Goliath (the SEC).

The trial court judge found that no substantial evidence existed in the SEC's favor to permit summary judgment with regard to five of the six fraud allegations the Defendant and his company were accused of by the SEC. Nevertheless, the SEC was awarded summary judgment against Defendant Sethi and his company on (1) the SEC's one remaining fraud allegation (one that was unrelated to financial mismanagement), namely the allegation that Defendant and his Company were inducing investors to do business with them by falsely representing that they were working with major oil companies; and (2) the non-fraud allegation that the SEC's allegations that the NDDF interests were securities (and thus Defendant Sethi should not have sold them without registration). These summary judgment findings were the result of Defendant's inability to afford proper representation, negligent representation by Defendant's counsel, the refusal of the trial court to use its discretion take judicial notice of facts that would vindicate Defendant, and the trial court's failure to apply the appropriate standard for summary judgment, depriving Defendant of a fair trial. (The vindicating facts, which Defendant's counsel had negligently presented untimely and the trial court unjustly refused to take notice of, were relationships with major oil companies Defendant did in fact have; thus, the only fraud allegation the SEC prevailed on was one where evidence that would have disproved the allegation went unrecognized. Defendant believes the SEC's over-aggressive prosecution of the case may have been the result of hasty assumptions and conclusions about the essential character of Defendant's company.)

As a result of the summary judgment finding against Defendant Sethi and his company on two counts, the District Court imposed (in addition to the SEC receivership of the company and Mr. Sethi) penalties and injunctions, against the Defendant. It is possible that the District Court ruled in favor of the SEC's motion for summary judgment on only these two subjective and easily targeted-for-debate issues (as opposed to the other more nefarious-seeming counts) because these two counts, at least as applied to Defendant Sethi and his company, could not, by nature, be unequivocally 100% debunked. Therefore, the Court, when granting summary judgment, picked the two allegations that were the most open to interpretation, (even though they were the least likely to have caused harm to investors); this allowed the SEC to avoid being discredited for their lack of due diligence prior to seeking action against the Defendant or the Company. The District Court's (and affirming the appellate court's) deference to the SEC, however, was unwarranted, especially in this case. The Defendant believes that the summary judgment against him on the two counts was unsubstantiated and erroneous, even given the subjective nature of the two counts. There are still clearly disputes in material facts regarding the case--that is a jury or trier of fact could have easily and very reasonably ruled in Defendant's favor had the two issues gone to trial. The Summary Judgment therefore violated Defendant's 7th Amendment right to a trial. The prejudice-based conclusions against the Defendant and the Company caused inequitable penalties and injunctions to be levied against the Defendant, not to mention that the Court imposed a receivership stripping Defendant and his company of all of their assets. By showing undue deference to the SEC, the District Court's action's--and that of the affirming Appellate Court--were not only inequitable to the Defendant, they also bring up the question of whether the legal system, which appears to grant much deference to the SEC (even when it's actions are rash and unreasonable), provides for justice for defendants who for any reason catch the mere suspicion or unwarranted ire of the SEC.

The SEC overlooked that the Defendant and his company had successfully executed several profitable partnerships in the past. The NDDF was too young for the SEC (or anyone else) to have been able to determine its

outcome, management dynamic or what voice the investors would have had in the partnership. The burden of proof should have lay with the SEC to substantiate its allegations against the Defendant and his company, and it is essential that the SEC would first have had to establish that the NDDF investors were securities holders, i.e. the SEC's premise that the investors were passively involved and had the expectation of relying on the Defendant or the Company for the NDDF's management. This could not have been determined until the NDDF was fully capitalized and had begun conducting business normally. The investors of the NDDF even had yet to choose--through vote--which exact sites (within the tract the NDDF acquired working interest in) they would participate in with the three major oil companies (*Crescent Point USA, Occidental Petroleum and Slawson Exploration*) selected for the NDDF's thus far one-and-only acquisition (as it was still in an early stage of development). It was also too soon to have determined what other oil and gas companies would have partnered with the NDDF for its future acquisitions and developments. Thus, it was hasty for the SEC to have made a determination as to whether the investments in the NDDF were securities or not, or to determine the full list of oil companies the NDDF would have worked with on its projects (though it already started working with three large, major oil companies--which should have been by itself enough to discredit the SEC's fraud allegation). Most importantly, if the SEC had been patient, thorough and done a proper investigation, it would have found that the NDDF's investors would have had significant managerial authority in the partnership, negating the SEC's premise of the NDDF interests being a security. The SEC's investigation would have therefore concluded that the SEC had no authority or jurisdiction regarding the investments in the NDDF, a member-managed enterprise that operated like a partnership. The SEC simply should not have even been able to take any legal action against the Defendant or his company – they did not have the jurisdiction.

Further the SEC stripped the Defendant and his Company of its ability to raise the capital the NDDF needed, which impeded the NDDF and its partners' opportunity to reach their goals. This is despite the likelihood that time would have revealed that the partnership may have succeeded. And by effectively shutting down the Defendant's company, Sethi Petroleum LLC, the SEC hurt not only the NDDF and its investors, but all of the Sethi Petroleum-facilitated ventures and their hundreds of investors. This is because Sethi Petroleum LLC, before the receivership, was interested in making the NDDF and the other ventures work and be profitable; whereas after the SEC-forced receivership took over Sethi Petroleum LLC, it was interested in liquidating assets, regardless of the prices received and harm to the company.

Outside of the fact that the NDDF was too young to have made a determination of its status being a security or not, the Defendant had good-faith reliance on his general counsel and CFO when determining that ownership interest in the NDDF were being offered as partnership interests. The Defendant discovered only ten days before the action was filed on May 4th 2015 that his general counsel Michael R. Davis was a fraud posing to be both an attorney and a CPA. To prove scienter or fraud the element of intent must be present, and the element of good faith must be lacking. In the case of Defendant Sethi, there is no evidence to suggest that Defendant committed any fraud with scienter (even if there was fraud--which Defendant contests) because whatever Defendant Sethi did, he acted in good faith and in relied on counsel. Furthermore, Defendant Sethi and the Company had been in business for over

12 years and can establish a long history of working with major oil companies, as well as an excellent track record of investor protection and satisfaction.

Due to the fact that the Defendant was financially crippled by the SEC-pushed receivership, he was unable to hire competent counsel familiar with the Federal Rules of Civil Procedure. Even in the Defendant's handicapped position the SEC still lost five out of six of its fraud allegations against Defendant Sethi on summary judgment; the one that they did win was because of a technicality relating to Defendant's counsel's untimely submission of exonerating evidence.

Even though all of the above stated facts are true, and more or less all indicated in the court filings (other than some of the good character evidence presented herein), they were disregarded when the District Court Judge made his ruling for summary judgment as many of the essential points (e.g. evidence of working with major oil companies like *Occidental/Oxy, Slawson* and *Crescent Point* and the reliance in good faith on general counsel) were either barely mentioned by Defendant's counsel or were introduced by Defendant's counsel into the pleadings after the Federal Rules of Civil Procedure indicated they should be introduced. In the summary judgment ruling, the court ruled that there was not an issue of material fact on the allegation that the Defendant and his company intentionally falsely represented that they worked with publicly traded and major oil companies. Yet, this finding of summary judgment goes against evidence which was not suitably considered by the court, evidence that proved the Defendant did in fact work with major publicly traded oil and gas companies. Additionally, in any case, given Defendant Sameer Sethi's good-faith reliance on his general counsel and CFO—who had deceived Mr. Sethi and Sethi Petroleum LLC about his credentials, and further given evidence of Mr. Sethi's good character and care for his investors—it is difficult to imagine that the Defendant had intentionally mislead investors or acted with scienter in any way.

Given the facts, the District Court erred in granting plaintiff summary judgment, and the Fifth Circuit Court of Appeals, to which Defendant appealed the case, erred in affirming the District Court's summary judgment. Facts that appeared in the record or were taken judicial notice of (e.g. the fact that the NDDF partnered with *Occidental/Oxy, Slawson* and *Crescent Point*, which are all major oil companies) were unfortunately disregarded. The District and Appellate Court also failed to take judicial notice, per their authority, of additional (relevant and apparent) facts that they should have taken judicial notice of in the interest of justice. By favoring the SEC on two counts with summary judgment, despite insufficient evidence put forth by the SEC, and compelling evidence contrary to the SEC's allegations, the District and Appellate courts violated Defendant Sethi's 7th Amendment right to trial.

The Defendant also strongly believes that the law regarding the definition of a security is not sufficiently clear or consistent. (This is especially true as regards the current *Williamson* factors test.) Aside from being of importance to the Defendant, Mr. Sethi, the matter is of national significance to American businesses as a whole, who seek clarity and consistency regarding the law. Thus, in this appeal, the Supreme Court will not only determine whether the Defendant's 7th amendment rights to trial were violated by the summary judgment -- which ruled in favor of the SEC's allegations that the investment in question were securities and that Defendant and his company fraudulently misrepresented their relationship with major oil companies -- the Supreme Court will also have the

opportunity to clarify ambiguities and inconsistencies in the law regarding the definition of a security (which itself determines when the SEC has jurisdiction to take legal action against a party).

VIII. Constitutional Provision and Statues Involved in the Case

- 7th Amendment Right to Trial
- "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."
- Federal Rules of Civil Procedure, including standard for summary judgment

According to Rule 56(c) of the Federal Rules of Civil Procedure, it was Plaintiff's burden to prove its assertion that the Defendant's claim was false by providing evidence showing the claim was false.

"(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" Rule 56 (c). Federal Rules of Civil Procedure.

- Federal Securities Laws - Securities Act of 1933 ("Securities Act') and the Exchange Act of 1934 ("the Exchange Act"), particularly;

i. Anti-fraud provisions (Section 17(a) of the Securities Act; Section 10b of the Exchange Act; Section 20(a) and (b) of Exchange Act – provisions regarding controlling persons' included);

ii. Provisions regarding sale of certain investments constituting investment contracts and securities (Section 2(a)(l) of the Securities Act and Section 3(a)(10) of the Exchange Act);

iii. SEC's authority to bring action against parties and seek civil penalties (portions of Section 21 of the Exchange Act and Section 20 of the Securities Act).

IX. Arguments/Reasons for Granting Petition

A. Did the District Court err in concluding on the record—and did the Appellate Court err in affirming—that the Defendant and his company lacked a business history with major oil companies (especially where judicial notice of the relationship may have even existed)?

The lower court should not have concluded on the record that the Defendant's company lacked a business history or relationship with major oil companies, especially on a motion for summary judgment. There were even demonstrable facts proving these relationships that had been judicially noticed by the court (in addition to other information the court had the opportunity to take judicial notice of).

On behalf of their investors, the Defendant's company made an acquisition with Irish Oil, in which they bought out its rights and participated in the drilling of multiple oil wells with the companies *Crescent Point USA, Occidental Petroleum and Slawson Exploration.* Judicial notice was taken on this matter. See District Court Opinion at Appendix B. But perhaps unknown to the court, however, these three companies are, in fact, major (and/or publicly-traded) oil companies. If the Court was not familiar with these companies on its own knowledge, it could have easily seen from a myriad of easy-to-search sources that they were in fact large, publicly traded oil and gas companies. Yet the court's judicial notice mentioning these three companies bizarrely seemed to be for the purpose of offering evidence that they were not major oil companies. It was appropriate for the District Court to take judicial notice of the three companies that were going to operate the Irish wells (the NDDF's first projects) but the court erred by not looking at the readily available public information to confirm that they were not major oil companies (as the Court erroneously believed)—if the Court had done a cursory search, it would have realized that they were in fact major oil companies. Thus by judicially taking notice of three major oil companies that Sethi Petroleum's NDDF venture would be working with, and then bizarrely disregarding the fact that they were major oil companies, the District Court grossly erred in the manner in which it took judicial notice of the matter, which had a profound effect on the court's judgment. See also, the legal discussion of judicial notice in part A of Section X, below.

Additionally, Sethi Petroleum's track record (history on wells drilled by its facilitated ventures) also shows that Sethi Petroleum did in fact have a relationship with major oil companies. The track record lists dozens of wells which had been drilled through Working Interest Partnerships with *Hess Corp*, a publicly traded and major oil company. Sethi Petroleum or one of its facilitated partnerships in fact holds working interest in several Hess-Corp operated wells. While the Defendant's negligent counsel, Adam Holcomb, brought up the relationship with Hess corp only belatedly, the aforementioned track record (drilling history) was on Sethi Petroleum LLC's website during the pendency of the case. This history, thus, additionally shows that Sethi Petroleum had a relationship with major oil corporations. Please see the Sethi Petroleum's track record in Appendix I. And even these facts were offered by Defendant Sethi's negligent counsel belatedly, as mentioned in the legal discussion of judicial notice in part A of Section X , below, the District Court could have taken judicial notice on its own (and should have in the interest of justice); even the Appellate Court could have taken judicial notice. Moreover, in addition to the information that the District and Appellate Court's had the opportunity to take judicial notice of, there existed additional evidence of Defendant's prior relationships with major oil companies, but as discussed in the last paragraph of part H of this section IX, the receivership effectively deprived Defendant access to Sethi Petroleum computer files, which

Defendant believes included past emails with companies like Cononoco Phillips and Hunt and Apache, as well as photos of oil drilling sites (and other settings showing a link to Defendant) with personnel of major oil companies present.

Thus, while five of the six fraud allegations against the Defendant were already found to be unsubstantiated for the purposes of summary judgment, even the remaining allegation, which regarded alleged misrepresentations as to working with major oil companies, should have been found to be unsubstantiated because of the above mentioned judicial notice that was taken (regarding Defendant's relationship with *Crescent Point USA, Occidental Petroleum and Slawson Exploration*) and the judicial notice that could have—and should have—been taken regarding the relationship with Hess corporation. Essentially, with regards to the only one of the six fraud allegations against Defendant on which there was deemed enough evidence for summary judgement against him, there was actually clear evidence showing that this summary judgment finding was incorrect and at odds with the truth.

The SEC's allegation against Mr. Sethi and his company stating that they were not working with major oil companies was simply untrue, and not supported by adequate investigation. Sethi Petroleum LLC was in fact working with major oil companies and, as discussed, judicial notice was even taken of these facts. As such the Supreme Court should overturn the summary judgment finding against the Defendant, and either conclude the allegation to be unsubstantiated, or alternatively remand the issue for trial, which would be the least that Defendant's 7th Amendment right to a trial would mandate.

B. So, even if Defendant and his company worked with major oil companies, could someone try to argue that Defendant's marketing materials used certain grammar or word choice (e.g. "like" and "as") in an inappropriate or misleading way?

Defendants did not mislead investors with their choice of words. One of the phrases the District Court, in its summary judgment against Defendant, notably highlighted from the marketing materials was "works with companies such as ExxonMobil and Hess". In another part of the opinion, the District Court judge says that some portion of Defendant's company's talking points tell agents to tell investors that the company has relationships "with major oil companies such as ConocoPhillips and Continental". Aside from that Defendant's company did in fact have a relationship with at least one of the example companies, *Hess Corp* (as discussed above in part A of this present section), the idioms "such as" and "like" indicate that what follows such idiom is/are illustrative examples only. (See discussion of dictionary definitions of "such as" and "like" in part B of section X below.) All four of the major oil companies Defendant's company worked with mentioned above in part A of this present section, *Hess, Occidental/Oxy, Crescent Point*, and *Slawson* are major oil companies, not unlike *ExxonMobil* and *ConocoPhillips*.

Moreover, as to whether the example major oil companies would be like those the NDDF would be working with, the future-predictive dialogue used by Defendant's company was appropriate because all joint ventures must convey information about business plans in a future-tense dialogue, and it was appropriate to suggest that the oil companies the NDDF venture would be working with (e.g. as well operators) would be major oil companies, given that Sethi Petroleum had a history of working with such. Defendant and his company did not know exactly which oil and gas company the NDDF would be participating with due to its still nascent status, but they did reasonably expect they would be major oil companies. (In fact, the initial operators to work with the NDDF, *Occidental/Oxy, Crescent Point*, and *Slawson* are actually major oil companies.) With regards to oil and gas

drilling, it is the nature of the business that a drilling project must be capitalized or funded before a driller can be selected. Thus, investors would have been well aware that the precise "major" oil company(s) the NDDF would be working with were yet to be determined. (Hence the use of idioms like "like" and "such as" in Defendant's marketing materials and talking points discussed in the first paragraph.) Also, the defendant kept a detailed investment track record on their website (Exhibit I) which clearly demonstrated the type of oil companies the NDDF would have worked with, given the companies Defendant worked with in the past (and most past wells in this track record, in fact, had a major oil company as the driller and/or operator). Thus, the defendant did not fraudulently induce any investor or commit any fraud.

The above was the intent of Defendant's company in its marketing materials and talking points. But the SEC selectively picked and chose marketing statements from various documents and did not present the statements with their corresponding contexts. It is not appropriate nor judicious to take the language out of context when interpreting a document as it contorts the intended meaning. The Defendant believes that at a certain point within the SEC's investigation, it became less about the protection of potentially wronged investors and more of a campaign to demonize and personally attack the Defendant in order to win the case. This is evident in the SEC's picking and choosing of the Defendant's marketing material and presenting only what fit their narrative. The Defendant was not fraudulently inducing investors to partner with him. In fact, the Defendant was conducting the standard form of marketing that is typical of a drilling partnership. The Defendant's intentions have always been to protect their investors (including by using larger, established drillers as much as practicable) and not to mislead them; any usage of language in marketing materials was appropriate and even necessary. Thus, the sufficient evidence and basis that Defendant has established with regard to him and his company having in fact worked with major oil companies (as discussed in part (A) above) is not undermined by any language use issue. The Supreme Court should still find that Defendant's 7th amendment rights to a trial were violated and direct the matter (re alleged misrepresentations on working with major oil companies) to trial.

C. Even if (somehow) the District Court was not able to verify that Sethi Petroleum's claims about its relationships with major oil companies were truthful, did the District and Appellate Courts violate Defendant Sethi's 7th amendment constitutional rights by issuing summary judgment and refusing to let the issue proceed to trial?

Even if the Court was not able to verify that Sethi Petroleum's claims about its relationship with major oil companies were truthful, the District and Appellate Courts' refusal to let the issue proceed to trial—as opposed to a summary judgment favoring Plaintiff—was a violation of Defendant Sethi's constitutional rights. The 7th amendment, in conjunction with Rule 56 of the *Federal Rules of Civil Procedure* demand that in a civil case with more than twenty dollars in dispute, the judge can only grant summary judgement if there are no genuine issues of material fact or procedural issues and movant would be entitled to summary judgment as a matter of law. The Defendant was denied his constitutional right to a trial because the case was in reference to a situation where clearly more than twenty dollars was in question and Defendant was able to show substantial facts to suggest that his company worked with major oil companies – including, for example, the fact that publicly traded companies (i.e. *Occidental, Oxy*) were operators for the NDDF's wells acquired by Irish Oil and Gas. Even if one desired that the Defendant should submit further evidence of their relationship with major oil and gas companies, or if a few

extraordinarily nit-picky people might question if *Slawson, Occidental and Oxy* should be considered major oil companies (because they are smaller than, for example, a behemoth like *Exxon Mobil*), there was then at the very least an issue of genuine material fact as to whether the Defendant and his company were working with major oil companies. Where there is a genuine issue of material fact, the case must be decided by either a judge or jury in a courtroom. (See further part C of Section X, below, discussing law related to burdens of proof, including with regard to summary judgment.) The defendant therefore believes that the Supreme Court should overturn the District Court's summary judgement ruling against the Defendant and the Appellate Court's affirmation, and the Supreme Court should either reverse the summary judgment (so as to be in Defendant's favor) or grant this case a fair court date. Doing otherwise would enable the persistence of a grave violation by the District and Appellate Court of Defendant's 7th amendment rights.

D. Did the lower court violate Defendant's 7th amendment rights by affirming a summary judgment that there was scienter on the part of the Defendant, despite the complete reliance on (thought to be) attorney and CFO for the company?

A court could not have properly found – least of all on summary judgment – that there was scienter on the part of Mr. Sethi, especially in light of his and his company's complete reliance on their allegedly sound counsel, i.e. Michael Davis, General Counsel and CFO for Sethi Petroleum. Finding such on summary judgment, despite evidence to the contrary was a violation of Mr. Sethi's 7th amendment rights. Scienter was in fact, a necessary element of each of the SEC's fraud claims because to establish a prima facie case under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5, the SEC must prove by a preponderance of the evidence: 1) a misstatement or omission (2) of material fact (3) in connection with the purchase of a sale or security (4) made with scienter. *SEC v. Gann, 565 F.3d 932, 936 (5th Cir. 2009).* Thus, the SEC could not have prevailed on any fraud claims if the element of scienter is negated, as Defendant emphatically argues to be the case.

Defendant Sameer P. Sethi had a satisfactory business history until he hired Michael Davis, who he relied on for legal and accounting advice. Michael Davis ran the day-to-day operations of the company and represented himself as both a lawyer and CPA, but he was in fact a fraud and convicted felon. (See Voting Ballot at Appendix C, in which Mr. Davis represented himself as general counsel.)

The Defendant relied upon Mr. Davis for over one year. Only eleven days before the SEC took Receivership of the company, the Defendant discovered that Mr. Davis was fraudulently posing as both a lawyer and CPA. Mr. Davis hung on his office wall a fraudulent law degree from SMU, MBA from UT and a CPA license. (Thus, Defendant didn't have reason to suspect that Mr. Davis did not actually possess these credentials.)

Mr. Davis was a convicted felon who had served six years in prison for financial fraud; bank fraud, wire fraud, credit card fraud and check fraud. See documents in Appendix D displaying criminal history of Michael Davis.

Mr. Davis oversaw at least seven other licensed attorneys who all believed him to be General Counsel for the company, as well as 30 other business professionals. Mr. Davis was an experienced conman and fraud who manipulated his way into the entire business relying upon him. He created an entire falsified background describing "his deceased son who died in a texting car accident", his newly "adopted son," that he was a church elder at a

church in Dallas, that his ex-wife and best friend was an attorney who would regularly give him advice, that he used to own a successful carpet business in which he claimed to have carpeted President Obama's Air Force One, and many other claims proven to be false.

Many people, including the company's hired attorneys, could testify to the fraudulent representations of Mr. Davis, and the reliance upon him by Mr. Sethi and the Company in general. As an individual, legally separate from the company for which Mr. Davis was an agent, Defendant Sethi has even less of a basis for attribution of scienter than Defendant Sethi Petroleum LLC. Sameer Sethi, was an agent of Sethi Petroleum LLC (but still distinct from it), exercising his good faith business judgment on the counsel of those whose scope of authority and expertise was to provide such counsel; that was, in fact, what Defendant was supposed to do. (See further, case law discussion in part E of Section X, below, regarding lack of scienter where there is reliance on counsel.)

Both the issue of whether representations of the company were misleading or legally actionable, as well as the issue of whether investments in the Company were securities, were reviewed and analyzed by the advisors hired by the Company for such purposes (principally General Counsel and CFO, Michael Davis); such advisors' review and analysis indicated that the investments were not securities and the representations were not misleading. With regards to Mr. Sethi's actions as agent of Sethi Petroleum LLC, it was reasonable and appropriate for Mr. Sethi to rely on such review and analysis of his advisors.

Given the incredible fraud by supposed attorney/general counsel Michael Davis, and the good faith reliance upon him by Defendant and his company, it would have stood to reason that the receiver in this case for Sethi Petroleum would have pursued criminal (and civil) charges against Michael Davis for defrauding and misleading the company -- and that the SEC would have supported this. However, as mentioned in the attached Declaration of John Weber (see Appendix K), an attorney for the receiver actually admitted that the SEC requested police *not* to pursue criminal charges against Michael Davis, even though the police were initially interested in pursuing or investigating the matter. The only rational explanation for this is that the SEC realized that giving Michael Davis, likely someone without substantial recoverable assets, the due blame would reveal the lack of culpability of Defendant Sameer Sethi and his company, and this would effectively mean that the SEC would be unable to pursue parties that did have substantial assets. And given that the receiver had an interest in recovering money from the receivership estate (including to pay its own legal bills), it played along with the SEC in hopes of a judgment against Sameer Sethi.

In any case, due to the Defendant's positive history of acting in the best interest of his investors, and his reliance upon Mr. Davis, a conman, posing as a trustworthy attorney and CPA, Defendant believes that the court should recognize that no scienter was involved on the Defendant's part and that Defendant, Mr. Sethi, and his company were in fact the victims. Given the fraudulent actions of Mr. Davis—in conjunction with evidence of Mr. Sethi's good character discussed in the fifth through ninth paragraphs of part G below of the present section IX—the Supreme Court should find that (independent of the question of whether there were actually misrepresentations as to relationship with major oil companies), Defendant, Mr. Sethi, did not act with scienter. And this Court should remove all penalties against Defendant, Sameer Sethi. Or, in the alternative, the Supreme Court should, at the very least, remand for trial the question of whether or not Defendant acted with scienter and hold that Defendant's 7th amendment rights warrant at least as much.

E. Could the investments offered by the Defendant's company, really have been verifiably determined to be securities, and, accordingly, that they offered investors negligible management/governance powers?

The investments offered by Sethi Petroleum should not have been determined to actually be securities. The investment contract was set up as a joint venture where investors were given an approximately 40-page brochure detailing the partnership's activities, locations and goals, which all future investors attested to understanding, then adopted in the subscription agreements; investors essentially voted or contracted to partner, per the venture's model. Moreover, all investors attested to having financial wherewithal and filled out and signed a suitability questionnaire. See Appendix H showing the NDDF's suitability questionnaire. Thus, investors of the NDDF did not rely solely on the efforts of Sethi Petroleum LLC or Sameer Sethi to make a profit. Investors would have even been able to make selections as to which wells and drilling companies to actively participate within the NDDF's targeted drilling locations

Accordingly, the SEC and the lower court were incorrect to conclude that the investors had limited powers. The NDDF investors were given extensive voting powers so they clearly had authority to exercise their choice. (Please see Appendix C showing the voting ballot.) Further, all investors were granted access to company records and to each other. Defendant had set up an entire department dedicated to constant communication with the investors, with contact at a minimum of twice in a quarter.

Given the above, the SEC and lower courts were incorrect in their conclusion that the NDDF should be seen as a security and that it accordingly offered investors no real management powers; the NDDF was facilitated as a partnership (where investors were also active, empowered participants), not a security-security based investment opportunity. The investment in question was not a security, then needless to say Defendant and his company could not have been found liable on the SEC's allegation that they sold securities without proper registration, which was one of the two counts the lower court granted summary judgment on. Moreover, if the investment in question was not a security, the Plaintiff, the SEC, would not have any authority to bring any of the six fraud related causes of action against Defendant, including under the provisions of Section 21 of the Securities and Exchange Act of 1934. And so, the SEC could not lawfully have brought action on the allegation of fraudulently misrepresenting to investors a relationship with major oil companies, which was the only one of the six fraud allegations the lower court granted the SEC summary judgment on (and the only other allegation on which summary judgment was granted other than the issue of selling securities without registration). We thus ask the Supreme Court to overturn the Appellate Court's affirmation of the District Court's summary judgment findings against Defendants (on both the issue of sale of unregistered securities and misrepresentations regarding major oil companies, see Exhibit I for a track record) and to determine that the NDDF was a partnership where the investors were sufficiently empowered as to not be security-holders.

(Please see further, discussion on case law regarding definition of Securities, in part D of section X, below.)

F. Even to the extent investments offered by Defendant's company appeared that they may have had characteristics of securities (e.g., alleged indications that investors' management voice might be limited), it may have been premature to be able to determine the management dynamic and governance influence of investors in this (still-capitalizing) nascent entity—and hence if the investments in this entity were actually securities?

Even to the extent, if any, investments offered by Defendant-Petitioners appeared that they may have had characteristics of securities (or provided some type of indications that investors' management voice might be limited), it may have been too early and premature to be able to determine the management dynamic and management influence of investors in this (still-capitalizing) nascent entity—and hence, too early to determine if the investments in this entity were actually securities.

The NDDF was in the early stages of development and nascent; at only $4 million of the total $10 million-dollar capitalizations; the NDDF needed time to become fully capitalized—or even operating at full scale. Because of its nascent nature, it is impossible to determine whether it would have been a partnership or security. The investors were given the expectation that they were going to be contributing to the management and success of the venture. And there was a mutual expectation between the company and the investors that the investors would monitor the development and production activity of the oil wells, review the expense and revenue reports of the development and keep up to date on all activities throughout the well completion and drilling phases. Defendant believes that with time, the NDDF would have shown these participation expectations to have in fact materialized. Defendant's company's project history also showed, in addition to the likelihood of business success, that investor protection and investors' voice in the NDDF would have been more than sufficient. The project history also showed that the NDDF was highly likely to work with major oil companies, as the NDDF in fact did with the *Irish*-acquired wells, which included assets that were being developed by major oil companies, Oxy, Crescent Point and Slawson Exploration. We believe that on the prematurity of the business venture alone, the Supreme Court should overturn the lower court's ruling (affirming summary judgment on the question of the investments being securities), as it was far too early to determine the NDDF status with regards to whether it was a securities-based investment opportunity (as well as with regard to the number and mix of "major" oil companies that would work with the NDDF). The Supreme Court should at least remand the question of the investments being a security for trial; Defendant strongly believes that if the Court does not do so, it would enable the persistence of a grave violation of Defendant's 7th amendment rights.

G. Did the SEC violate its investor protection mandate by causing the closure, on an unsubstantiated claim, of the Defendant's company, Sethi Petroleum LLC, a company that would have likely helped its investors conduct oil and gas business to their benefit (especially where the SEC caused this shutdown without recognizing the Defendant and his company's successful track record when dealing with investors)? Even if the SEC thought there to be some fault with Defendant or his company, would it have been more appropriate and in the best interest of the investors for the SEC to have sought alternate resolutions?

The SEC violated its investor protection mandate by causing the closure, on an unsubstantiated claim, a company that may have likely fulfilled its business purpose and benefited its investors -- and causing such company shutdown without recognizing the Defendant and his company's successful track record when dealing with investors.

The SEC has a responsibility to protect investors. To shut down an established company because of the complaint of just one or two investors, out of hundreds, was not only unfair on the part of the SEC, the SEC was also shirking its responsibilities and acting outside the scope of its investor protection mandate. Further, the accusation was never substantiated, being a mere allegation. Defendant believes that David Miesenbach, the investor who was the catalyst for the SEC's action, was frustrated because oil prices were on the decline and drilling projects were taking longer than expected. The shutdown of Sethi Petroleum LLC did, however, harm hundreds of investors because of the SEC's lack of due diligence and rash (and unduly harsh) action. This is because the SEC, and its pushed-for receivership, effectively condemned all of the Sethi Petroleum-facilitated ventures to a grim fate; the receiver, who took control over these ventures, did not make efforts to run these ventures profitably, but rather sold valuable oil and gas assets for substantially below fair value (or the asset's true value to the investors, in light of what they could have yielded from the asset). One reason the receiver may have been overcautious was that it wanted to ensure that there were certain to be enough funds to cover the receiver's fees (which don't go up with performance of the business, reducing the receiver's incentives to take any business risk that could profit investors). The receiver in this case (like most court-appointed receivers) did, in fact, make substantial payments out of the receivership estate to itself, where such payments had higher priority than payments to investors, thus hurting investors. In fact, to make these payments (and the receiver's billing for services) appear more warranted, Defendant believes the receiver tried to demonize Defendant, even though he had acted in good faith. This case is thus a good example of why businesses legitimately pursuing a profit in good faith, without any intent to fraud or make misrepresentations to investors, should not be put into receivership. In the present case, perhaps bad elements in the Company, i.e. Michael Davis, could have been removed, but the Company should have otherwise left to operate without a receivership--that would have been more consistent with the SEC's responsibility to look after investors' interests in this case, as opposed to a receivership.

Notably, the complaining investor who was the catalyst for the SEC's action, David Miesenbach, was not even an investor in the NDDF, the investment contract/venture in question. (Note, Jamie Castillo is also named as a party to the lawsuit, but it is unclear to Defendant if the SEC alleges he was an investor or otherwise; Defendant does not have any knowledge of who Jamie Castillo is and why he is a party to this lawsuit.)

The investment contract that forms the basis of the present legal action against Defendant, i.e. the contract for participation in the NDDF, did not have any investor complaints. That fact that the SEC's witness was involved in an entirely different program, should by itself, provide sufficient basis for the Supreme Court to order the case to be dismissed entirely. The Supreme Court should at least set aside the lower court's affirmation of summary judgment against Defendant.

If the SEC had researched Defendant Sameer Sethi's business background, it would have discovered several examples of how Mr. Sethi has continually made his business decisions in the best interest of his investors. Prior to Mr. Sethi starting his own company, Sethi Petroleum LLC, he worked for an oil company that had defrauded their clients—though he was unaware of such fraud until well after he started work for the company and quit as soon as he became aware. A few months after he quit, though he was only 21 years of age, Mr. Sethi helped organize a class action lawsuit to help the 175-plus investors who had been defrauded. Please see Appendix J

referencing a case against Wiliam Seelye, who headed the fraudulent company Mr. Sethi had worked for; though it is not the exact case Mr. Sameer Sethi assisted with, it shows the person (William Seelye) who Mr. Sethi worked to help protect investors against, and Mr. Sethi speculates that his efforts in the case he assisted with (which was an earlier case) may have contributed to the long 99-year sentence issued against Mr. Seelye in the case shown in Appendix J.

Additionally, Defendant, Sameer Sethi, ran a Broker Dealer/RIA from January 2003 to September 2013, in which he continually met very high regulatory standards. He managed over 430 million dollars of investor funds without ever having a client complaint. He managed the retirement accounts of employees of the cities/counties of Rockwall, Hunt, Decatur and Palestine's city. Defendant voluntarily wound up the company in 2013 (for cost-benefit business reasons) after a 10+ years devoted to the business and its clients without any customer complaints.

In 2003, Defendant also started his own oil investment company and operating company. In his fifth joint venture program for his investors, Defendant's main working interest partner, Chevron Corporation, abandoned the project, leaving him and his partners with a 4 million dollar loss. However, Mr. Sethi was able to salvage more than 3 million dollars and then used funds from his own pockets to help reimburse his partners. Defendant spent approximately $750,000 of his personal money voluntarily, with no legal obligation, and paid back his investors the remainder of the initial capitalization, making them 100% whole on their loss. In or around 2014, when oil prices were on the decline, negatively impacting the financial performance of Sethi Petroleum LLC and causing it to struggle, Defendant Sethi, rather than laying off many employees, borrowed around $400,000 from his father to keep the company afloat. (See sworn declaration of Sameer Sethi, attached as Appendix L). These actions speak very clearly and plainly to Mr. Sethi's upstanding character and honest dedication to his clients.

Even after his company went into receivership, Mr. Sethi showed care and concern for his investors and employees. Since the receiver, Marcus Helt, has taken control of the company assets collected hundreds of thousands of dollars from the receivership of Sethi Petroleum and Sameer Sethi. Still, he has failed to pay former employees of Sethi Petroleum LLC their final paycheck, even denying former employees COBRA benefits (for which he was in federal violation). Moreover, the investors have seen, thus far, little to none of their money back, whereas were it not for the Receivership, Defendant Sethi believes investors would have had an opportunity to earn a significant profit on their investments. (But of course, on numerous occasions, the receiver requested the judge to pay him the highest available hourly rate on his own fees.)

While the receiver has seemingly prioritized his fees over Sethi Petroleum's employees--and even the investors, Defendant Sameer Sethi, despite being broke due to the receivership, borrowed money to pay a few former employees to help them after loss of employment due to the receivership. Also, when the Receiver negligently auctioned off Sethi Petroleum LLC's office computers containing sensitive investor information without wiping the investors' and employees' sensitive information from the hardware beforehand (as he had been instructed to do so previously), Defendant Sameer Sethi, who had bought some of the computers from auction and thereupon discovered that sensitive data was never wiped, took the effort to report the situation to the Court—which Mr. Sethi did for the protection of his investors and employees. Again, these acts speak to the Defendant Sameer Sethi's character, honest intentions and care for the investors and employees of his company.

The SEC alleged six civil fraud allegations against Defendant; five of them were deemed to fail to meet the standard for summary judgment, and the SEC did not even pursue them further. One of them is still being litigated, including through the present filing, which such allegation is not financially related (and on which such allegation Defendant can demonstrate his lack of culpability, as demonstrated elsewhere in this petition).

Even if the SEC believed there to be some fault with the Defendant or his company, it would have been more appropriate – and in the best interest of the investors – for the SEC to have sought alternate resolutions.

It would have been in the best interest of the investors for the SEC to have approached Sethi Petroleum LLC and the NDDF with a careful investigation instead of a condemnation. The SEC could have worked with the company's counsel to help find a solution to satisfy the complaining investors. It would also have been prudent for the SEC to have reviewed NDDF's business history, as well as that of Sethi Petroleum. Doing so would have likely proven to the SEC that Sethi Petroleum LLC and its principal, Sameer Sethi, have a history of showing care for their investors.

Therefore, Defendant believes that if the SEC had done a more thorough investigation before taking fatal irreversible action to Sethi Petroleum, rather than shutting it down without warning, both the one upset investor could have been pacified and the other hundreds of investors would likely not have been harmed—by shutting down Sethi Petroleum, many investors not only lost large parts of invested funds (including as a result of receivers' sale of assets for pennies on the dollar) but the opportunity to make a profit. The SEC could have even temporarily froze Defendant's and his company's accounts pending the investigation, rather than hastily placing the Defendant and his company in receivership. As such we encourage the Supreme Court to overturn the lower court's ruling and remedy the results of the SEC's overzealous and unwarranted actions and unfair prosecution of this case.

H. Was Defendant--stripped of his assets by the receiver and unable to afford access to evidence or legal counsel experienced in federal securities litigation--ever in a position to properly defend himself? Was the counsel representing Defendant negligent in his representation in the matter of this case?

The Circuit Court of Appeals should have, as a matter of equity and justice, required the District Court to grant the Defendant a wider opportunity to engage in his defense (more than a typical Defendant). Because the Defendant was not in a position to adequately represent and defend himself; especially given that the receivership stripped him of his assets, making him unable to afford access to evidence or legal counsel that is experienced in federal securities litigation – Defendant was, for practical purposes, forced to hire an inexperienced attorney who was negligent in his representation. As a result, defendants side of the story was never heard, and exculpatory evidence was presented belatedly to the Court.

The Receiver seized Sethi Petroleum's business assets, as well as Mr. Sethi's personal assets, and even wrongfully seized Sameer Sethi's father's apartment, where the Defendant, Sameer Sethi, was living at the time of receivership. Defendant Sethi should have received enough money from his estate to be able to hire proper legal counsel, but this did not occur. Defendant Sethi, in fact, received no money for legal costs from his estate. This was an obligation of the SEC that was not met and resulted in an unfair process to the Defendant.

Moreover, despite the fact that much of the evidence Defendant needed to defend the case was found on Sethi Petroleum's company hard drives, it would have cost Defendant $25,000 to decrypt the data on these hard drives. (The Receiver gave the Defendant's attorney a black hard drive that was supposed to contain all of the data

and documents of the case. This device was encrypted, however, and it was impossible for the Defendant to access the data he and his company needed to defend themselves, unless they paid $25,000 for decryption, which they could not afford.) This contributed to the Defendant being denied his ability to receive a fair proceeding.

Because Defendant lacked access to any funds from his estate, he was forced to hire attorneys who where incompetent in the ways of federal court matters, including a young, inexperienced attorney named Adam Holcomb, who was the sole legal counsel for Defendant and his company for much of the case.

One of the ways Defendant's attorney, Adam Holcomb, showed negligence in representation was that he did not include certain evidence supporting Defendant's company's having a relationship with major oil companies in the original response to the SEC's motion for summary judgment; he included the evidence in the Defendant's Response to Plaintiff's Motion to Enter Judgment. The evidence regards interests in Hess-operated wells, as well as the operation of certain wells (owned by Sethi Petroleum's NDDF venture) by the major companies *Crescent, Oxy, and Slawson*, but the Court refused to consider the evidence for being untimely. See Defendant's Response to Plaintiff's Motion to Enter Judgment at Appendix F. In fact, Mr. Sethi had asked his attorney to include more information demonstrating the company's and Mr. Sethi's business history in drilling oil wells with major companies even before the motion for summary judgment was filed; Adam Holcomb failed to do so.

Also Defendant Sameer Sethi repeatedly requested Mr. Holcomb to pursue discovery, evidence gathering, and an actual court hearing, but Mr. Holcomb was intimidated and didn't do so. Mr. Holcomb also failed to include more information demonstrating the Defendant's reliance on Mr. Davis (the conman posing as an attorney and CPA). Defendant is, in fact, currently preparing a suit for negligent legal representation against Adam Holcomb. See affidavit of Sameer Sethi regarding claims against Adam Holcomb at Appendix E.

Lastly, particularly because the receiver had seized Defendant's and his company's assets, Defendant and his company were never given access to the data/evidence or adequate legal counsel to properly defend themselves, and the District Court did not use its discretion to give Defendant and his company wider ability to defend themselves to ameliorate the shortcoming. (If a copy of the files were given to the Defendant, or at least the funds needed to cover the costs to access them, Defendant could have, amongst other things, easily shown a history of relationships with major and publicly traded oil companies, even providing things like email trails with major companies like Conoco Philips, Hunt and Apache, and oil field photos with personnel present.) Accordingly, for this additional reason, we are asking the Supreme Court to overturn the Appellate Court's refusal to overturn the District Court's summary judgment decision — and to, either direct the case to trial (with more time for discovery), or, in the alternative, grant to Defendant equitable relief as to penalties and injunctions imposed by the District Court (and affirmed by the Appellate Court).

I. Even if Sethi Petroleum LLC had actually made some misrepresentation in the sale of securities, should Sameer Sethi have been personally found to be liable or culpable, especially given that Sethi Petroleum LLC is a distinct limited liability company and the company relied upon its thought-to-be attorney (general counsel) in its actions?

Defendant Sameer Sethi's company was established as a distinct business entity, an LLC, and Defendant acted in good faith a specific capacity in a larger organization. Application of legal liability to Defendant Sameer Sethi in this case erodes the concept of the "corporate veil", as well as "the business judgment rule", both well-

established legal principles. Even though the securities laws cited by the SEC reference the potential liability of a controlling person, it would be unjust for Mr. Sameer Sethi to have liability as a controlling person where he, in performing his actions as an agent of Sethi Petroleum LLC, relied extensively on others, especially general counsel and CFO Michael Davis. Even, Section 20(a) of the Securities Exchange Act of 1934, the provision cited by the SEC in alleging Defendant Sameer Sethi to have personal liability, provides that "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 21(d)), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. As Defendant discusses more extensively in section D of the present (above), Defendant Sethi acted in good faith by relying on his advisors, especially his general counsel and CFO Michael Davis. And thus, by only acting on such reliance, Defendant Sethi could not have been said to induce any "violations or cause of action" even if there was some violation or cause of action.

Additionally, the receiver should not be able to "pierce the corporate veil" just to collect more money, especially to raise money to pay his own and his law firm's legal expenses. An argument may have been made if Defendant, Sameer Sethi, individually acted with intent to defraud investors, but again, Sameer Sethi acted in good faith in his role (as part of a larger organization), in reliance on others thought to be experts, particularly general counsel and CFO Michael Davis. Moreover, the investors in the NDDF project signed an indemnification protecting the officers of the company from any personal liabilities. Thus, by being found liable by the District and Appellate courts, Defendant Sameer Sethi, essentially was forced to assume more risk than he bargained for in choosing to perform management services for Sethi Petroleum LLC, and through Sethi Petroleum LLC, serving the NDDF.

In conclusion, even if the Supreme Court feels it must find Sethi Petroleum LLC liable, the Supreme Court should set aside the summary judgment finding of liability against Sameer Sethi (personally) and should eliminate any fines, penalties and injunctions imposed against Mr. Sethi.

J. Do current SEC guidelines, *or the existing law as a whole*, provide sufficient guidance as to what constitutes a security and what elements would, if they exist, preclude an investment from being characterized as a security? If not, should the law, particularly the existing case law, be revised?

Current SEC guidelines, and the existing law as a whole, provide insufficient guidance as to what constitutes a security and what elements would, if they exist, preclude an investment from being characterized as a security. In particular, Defendant believes that there is too much ambiguity in the current test generally used by this Court for the key characteristic of a security (per *Howey*). This key characteristic is that profits in the enterprise are expected solely from the efforts of others. The current test for finding whether this characteristic exists is the "*Williamson* factors", which include an evaluation of (1) an agreement among the parties leaves so little power in the hands of the partner or venture that the arrangement in fact distributes power as would a limited partnership; (2) the partner or venture is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venture is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers. (See *Williamson v. Tucker*, 645 F.2d at

424.) The second and third of the above factors are the most ambiguous (in terms of what it takes for them to be met), given their subjectivity, causing businesses nationwide to scratch their heads.

The Defendant asks this Court to reconsider how exactly the second *Williamson* factor should be applied. By focusing on a partner/venturer's specific experience and knowledge, it is possible for the exact same interest to be characterized two different ways depending on the particular background of the partner. And, while this odd in itself, the factor itself, inherently requires a reviewer to have extraordinary knowledge of the business venture's business and the partner/venturer's background—even then, different reviewers may come to different conclusions given the subjective nature of the analysis. Someone with an MBA from Harvard University, but no oil and gas industry-specific experience, can be found to hold a partnership interest in an oil and gas drilling venture, whereas a seasoned oil field worker or geologist with no discernable business education (but the ability contribute to decision making in other ways) holding an identical interest could be found by the reviewer to be holding a security. Other reviewers may come to a different conclusion.

Moreover, does lacking expertise in particular areas relevant to the partnership, but still possessing knowledge or qualities whereby the partner would be able to contribute to the management of the partnership, demonstrate a dependence on the promoter or manager, i.e. with reference to the third *Williamson* factors? Given the breadth of areas covered by an industry such as oil and gas, virtually no one's experience in the oil and gas industry, would, in theory, be enough to negate the dependency that the *Williamson* decision seems to contemplate (given that very few people would have knowledge of all relevant areas). But that does not mean that the investor/partner with oil drilling expertise cannot contribute meaningfully to the partnership. Someone without a college degree who has worked for years in oil fields might not have the financial acumen of a 30-year old MBA or CPA who is a professional in, say, finance or commodities futures trading. But even though the first individual does not have the expertise of the second, and vice versa, both could have something to contribute meaningfully to the partnership, particularly if they commit to continually educate themselves on topics relevant to the partnership. Yet, under the second *Williamson* factor, it would appear a court is likely to find that the high school dropout oil field worker would be more qualified to be a partner/venturer in this venture than the college educated professional not in the oil and gas business. And under the third *Williamson* factor, some courts may likely find that neither of these individuals has a wide enough scope of expertise as to not be considered dependent on the manager(s) or promoter(s).

The Defendant humbly ask this court to fashion an application of the second and third *Williamson* factor or coming with an alternative analysis that avoids potential inconsistency in the law or outcomes contrary to reason and practicality. So as to give greater weight to less subjective considerations, the application or alternative analysis should shift more focus on the actual possession of powers by partners and ventures under the relevant contract(s) and the Texas Business Organizations Code or similar laws in other states.

This Court should also provide some guidance as to how meaningful is a suitability questionnaire like the one used by Defendant's company, Sethi Petroleum LLC. In determining whether investors/partners in a non-passive venture are suitable partners, Sethi Petroleum sought to obtain self-reported information from prospective partners. This is the easiest and most cost-efficient means of evaluating someone's suitability for the

partnership. Yet to what extent, if any, must additional due diligence be done by a promoter of a partnership/venture? Additionally, should a court be capable of deciding what suitability criteria and questions would be most relevant in determining suitability for a business partnership/venture? After all, different minds may value different criteria in a prospective business partner. Defendant would suggest that this Court recognize a presumption in favor of partner participation-suitability (and against reliance on a promoter) if an investor attests to adequate knowledge and capability in a suitability questionnaire (and such attestation appears to be reasonable).

A new analysis of the *Williamson* factors that considers that a group of venturers/partners are likely to have diverse backgrounds and diverse expertise (and thus each of those in this group are likely to be able to individually contribute to the partnership, despite lacking expertise in all areas) and that these venturers/partners also have ample protection in state laws, would be more logical—as well as more fair and equitable—than having the question of whether or not a partnership interest is a security turn on the expansiveness of background/expertise of each individual partner/venture. Moreover, such new analysis should resolve the ambiguities discussed above—and favor less-subjective factors that would improve consistency of application of the law over subjective ones, especially given that uncertainty to businesses as to whether a type of investment is a security can lead to substantial costs and undesirable risk. Thus, this Appeal is an opportunity for this Supreme Court to make a great contribution to an important area of business and securities law by adding logic to it and reducing uncertainty of the law's application.

(Please see further the discussion of legal definition of securities, in part D of Section X.)

X. Relevant Law and Informative Sources

A. Relevant Law Regarding Judicial Notice

A Court may take judicial notice on its own. *Fed. R. Evid. 201(c)(1).* And may take judicial notice at any stage of the proceeding. *Fed. R. Evid. 201(d).* Given that the Court can take judicial notice of facts at its own discretion, given the clear and convincing facts of the matter, the Court should have taken judicial notice of these facts, in the interest of truth and justice. This is especially true since the untimeliness of Defendant's introduction of this evidence was due to the fault of the Defendant' young, inexperienced counsel, whom Defendant hired because the receivership initiated by the SEC left the Defendant financially strained, Thus, the SEC was allowed to present allegations against the defendant with the presentation of some of the evidence, while clear and convincing evidence contradicting those allegations was ignored.

In its motion for Summary judgment, the Plaintiff-Appellee alleged that the Defendant and his company made several material misrepresentations; however, the District Court only granted Summary Judgment "as to the misrepresentations of partnerships with major oil companies." ROA. 4300. But even on this one misrepresentation issue, the District Court erred in its granting of summary judgment on this particular allegation (and the Appellate Court erred in affirming)., The District Court took notice of the NDDF's working with major oil companies, *Crescent Energy U.S. Corp, Oxy USA Inc.*, and *Slawson Exploration*, on the Irish Oil and Gas wells—though perhaps without being aware these were major oil companies. Moreover, at the start of the litigation, it was readily apparent on Sethi Petroleum's website its track record and actual history of drilling 78 oil wells in North Dakota with publicly traded oil companies, namely *Hess Corp.* The Defendant's attorney, in a response to a motion to enter judgment, tried to point out to the Court, in addition to Sethi Petroleum's relationship with *Crescent*, *Oxy* and *Slawson*, Sethi Petroleum's relationship with *Hess Corp.* (See the Defendant's Response to Plaintiff's Motion to Enter Judgment attached at Appendix F). And while it may have been too late per the Federal Rules of Civil Procedure, the Court could have, nonetheless, chosen to take judicial notice of this information—and in fact, should have done so in the interest of justice.

Secondly, "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *U.S. v. Herrera-Ochoa*, 245 F.3d 495, 500 (5th Cir. 2001) (citing Fed. R. Evid. 201(f). Thus, even if the District Court failed to equitably take judicial notice of important facts, the 5th Circuit Court of Appeals would have had the discretion to do so – and in the interest of justice, should have in fact done so.

As noted in Section C, the District Court also erred in its granting of summary judgment on this particular allegation because early in the same opinion, the District Court acknowledges important exculpatory facts regarding the purchase by the NDDF, a Sethi Petroleum-facilitated venture, of wells operated by *Crescent Energy U.S. Corp, Oxy USA Inc.*, and *Slawson Exploration*, all major oil companies. It is bizarre that these facts judicially noticed by the court were not considered as supportive of the Defendant's and his company's representations in question. The District Court erred by failing to realize the actual significance of these judicially noticed facts, and the Appellate Court erred by not reversing the summary judgment that resulted largely because of this error.

"A fact that has been judicially noticed is not subject to dispute by the opposing party—indeed, that is the very purpose of judicial notice." *Taylor v. Charter Medical Corp.*, 162 F. 3d 827, 831 (5th Cir. 1998). Thus, the

judicially noticed facts should not have been ignored, even if they did stem from evidence not timely presented to the Court. Also consequently, the judicial notice stating the above facts itself was completely proper and within the discretion of the Court. "Judicial notice may be taken of facts known at once with certainty by all reasonably intelligent people in the community without the need of resorting to any evidential data at all. Judicial notice may be taken without request by a party of such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." *Weaver v. U.S.,* 298 F.2d 496 (5th Cir. 1962). Information regarding the size of publicly traded corporations is public knowledge and can be easily found on the Plaintiff Appellee's own website: www.sec.gov/edgar.

B. Dictionary Definition of Idioms, "Such As" and "Like"

As brought into question in Section B, the Plaintiff-Appellee and the District Court made much of Sethi's use of the phrase "such as" to point out that examples given of major oil companies were not literally in partnership with Sethi. It should be noted that *Merriam-Webster* describes the phrase "such as" is an idiom "used to introduce an example or series of examples." https://www.merriam-webster.com/dictionary. Thus, sales materials gave examples of major oil companies, the materials did not literally claim to be partnered with all oil companies mentioned. Moreover, considering the dictionary definition, Sethi's use of "like" and "such as" in his materials makes sense and was not a misrepresentation. Furthermore, it would have been impossible to specifically say which drilling company would have been involved until after the NDDF was fully capitalized. It was simply too premature in the life cycle of this particular still-capitalizing partnership/venture (the NDDF) to determine which drilling company would be working with the NDDF. And in their choice of language, the Defendant Sethi and his company were simply trying to convey the fact that major oil companies have worked with Sethi Petroleum in the past, and it is expected that the drilling company for the present venture (the NDDF) would also be a major oil company, though it is not clear yet which one it would be. The drilling company (operator) would have actually been selected by majority approval of the investors only after funding was complete. The Defendant and his company, thus, actually showed they were aiming for accurate representation, not misrepresentation. And given that the actual operators of the NDDF's *Irish*-acquired wells NDDF were *Crescent Energy U.S. Corp, Oxy USA Inc.*, and *Slawson Exploration*, all (easily-argued-to-be) major oil companies, the "such as" (illustrative example) companies in Sethi Petroleum's marketing materials were not in reality dissimilar to what was companies Sethi Petroleum was partnering with for the NDDF's (so far only) oil well operations. (Or at least, we believe most triers of fact would have determined this to be the case had the case been allowed to proceed to trial.) In fact, the Plaintiff's own website, https://www.sec.gov/edgar.shtml, reports that *Crescent Point Energy U.S. Corp.*, and *Oxy USA Inc.,* are publicly traded corporations. But by ruling against the Defendant, the lower court ignored the generally accepted dictionary definitions of "like" and "such as" as terms used to introduce illustrative examples only.

C. Relevant Law Regarding Burdens of Proof, Including on Summary Judgment

According to Rule 56(c) of the Federal Rules of Civil Procedure, it was Plaintiff's burden to prove its assertion that the Defendant's claim was false by providing evidence showing the claim was false.

"(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials;" *Rule 56 (c). Federal Rules of Civil Procedure.*

Thus, the burden was on the Plaintiff to put forth evidence and show that there is no genuine issue of material fact as to its allegations being true; the SEC was far from meeting its burden. It was also error for the district court to find that the wells purchased by the defendant were operated by arguably major oil companies, such as *Crescent Point, Slawson* and *Oxy*, yet find that the defendant's statement about working with major oil companies to be false. I was taught that court proceedings are about a search for the truth. That a district court found that *Oxy USA, Slawson and Crescent Point Energy*, which can easily be considered to be major oil and gas companies, were operators of Sethi Petroleum's wells should be enough to prove that their claim about working with major publicly traded companies was true. The Defendant believe the District Court may have been too eager to show deference to the SEC, even where the SEC was plainly and aggressively "reaching" and abusing its discretion with regards to prosecuting the Defendant and his company (such prosecution being guided by mistaken hunches and suspicions, as opposed to significant evidence).

"A dispute about a material fact is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

Similarly, the SEC, the moving party, failed to meet its burden of there being no genuine issue of material fact on the truthfulness of the SEC's claim about the verb tenses in Sethi Petroleum's marketing materials being misleading. The marketing materials are replete with the use of the past, present and future tenses. Whether the marketing materials meant only future events or present events, or past events is a subjective conclusion that is ideally suited for the determination of the trier of fact, such as a jury. Moreover, even if was somehow appropriate to nitpick at verb tenses in the marketing materials, the intent to mislead was at least uncertain. In the SEC's best case scenario, it should have been an issue of genuine material fact for determination at trial; yet the District court erred in granting summary judgment in favor of the SEC and the Appellate court erred in affirming.

This Court has held that in the absence of proof, "the nonmoving party could or would prove the necessary facts." *Salazar-Limon v. City of Houston*, 826 F.3d 272, 277 (5th Cir. 2016). (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990))." The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). This high burden on the movant for summary judgment is crucial in protecting a defendant's Seventh Amendment right to a trial by jury.

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government held to the principles of its constitution." –Thomas Jefferson.

The only conclusion can then be that the Defendant was wrongfully denied his seventh amendment right to trial. The District Court erroneously accepted the SEC's assertions – unsupported by any evidence – that the Defendant's company's claim of working with major oil companies was false and its marketing materials were

misleading. The District Court also erroneously accepted the SEC's assertions—without sufficient support (and, in fact, with evidence to the contrary) that the Defendant acted with scienter. Moreover, the Defendant believes that even the question of whether the investments at issue were in fact securities (despite Sethi Petroleum's intentions to structure the venture to the contrary)--to which only an answer in the affirmative would give the SEC authority to even prosecute this case--was, at most, a genuine issue of material fact that should have been placed before a jury or judge at trial, per Defendant's 7th amendment rights.

D. Relevant Case Law Regarding Definition of Securities

As discussed in Sections E and F, there are discrepancies in the SEC's definition of security. "Security" is broadly defined under the *Securities and Exchange Act*. 15 U.S.C. §§ 77(a)(1) and 78c(a)(10). An investment contract exists where: (1) individuals are led to invest money; (2) in a common enterprise; (3) with the expectation that they would earn a profit solely through the efforts of the promoter or someone other than themselves. *SEC v. Howey Co.*, 328 U.S. 293, 298-99 (1946). The first two elements are not in dispute. Thus, the argument is over whether there was an expectation that the investors would earn a profit solely through the efforts of someone other than themselves. In fact, given that the common enterprise was this still nascent and still capitalizing venture, there becomes increased focus on the term "expectation" (i.e. of investors performing activities showing that their endeavored profit was not solely through the efforts of someone other than themselves).

Williamson Analysis

The leading Fifth Circuit case interpreting Howey's third element is *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981). In *Williamson*, this Court held that the term "solely" is interpreted in a flexible manner, not in the literal sense. Id. at 418. In evaluating whether an interest is a security, "form should be disregarded for substance," and courts should analyze the "economic reality underlying a transaction, and not on the name appended thereto." *United House. Found., Inc. v. Forman*, 421 U.S. 837, 848-849 (1975). Therefore, to determine whether profits are expected to come "solely" from the efforts of others, this Court adopted the Ninth Circuit's test, which defines the critical question as "whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 483 (5th Cir. 1974) (citing *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973)).

In *Williamson*, this Court concluded that a general partnership or joint venture interest may possibly satisfy the third *Howey* element if the investor can establish one or more of the following factors; (1) an agreement among the parties leaves so little power in the hands of the partner or venture that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venture is so inexperienced and unknowledgeable in business affairs he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venture is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers. 645 F.2d at 424.

These factors are not exhaustive. Id at 424, n.15. Although "[t]he test stated in *Williamson*... refers to the investor's experience in "business affairs," without referring to specialized knowledge, this Court has "made clear that the knowledge inquiry must be tied to the nature of the underlying venture." *Long v. Schultz Cattle Co.*, 881

F.2d 129, 134 n.3 (5th Cir. 1989) (noting that "any holding to the contrary would be inconsistent with *Howey* itself").

Furthermore, this Court has stated that "a strong presumption remains that a general partnership or joint venture interest is not a security." *Youmans v. Simon*, 791 F.2d 341, 346 (5th Cir. 1986). This court, in *Youmans*, made it clear that a "party seeking to prove the contrary must bear a heavy burden of proof." Id. (citing *Williamson*, 645 F.2d at 424). Therefore, an examination of each of the *Williamson* factors determines if the SEC has met its heavy burden in establishing that the type of interest the Defendant-Appellant sold was a security.

The First Williamson Factor: Partner or Venturer's Actual Power

The first *Williamson* factor the court considers is whether the agreement between the parties gives the partner or venturer little to no power, such as a limited partner would have. Williamson, 645 F.2d at 424. A general partnership or joint venture interest usually does not fall within the broad definition of an "investment contract." *Williamson*, 645 F.2d at 419-421. However, agreements that are more akin to limited partnerships may be considered a security under the statutory definition. *Youmans*, 791 F.2d at 346. Limited partners have limited liability, are typically unable to dissolve the partnership or bind other partners, and have virtually no power to take an active role in the management of the partnership. Id.

In the present case, Plaintiff alleges that the partners' express delegation of the management of the day to day operation of the joint venture to the Defendant-Appellant as the managing partner indicates formation of a security. ROA 2842 2843. However, merely delegating day to day operations does not, standing alone, create a security. *Williamson*, 645 F.2d at 423. Despite the delegation of operational duties, partners retain all of the rights granted by the Texas Business Organizations Code (TBOC). ROA 3075-3094 and ROA 3106-3118.

In addition, as noted in Section E, the NDDF document granted additional rights to safeguard their ability to affect the outcome of the joint venture: Partners/venturers could remove the managing venturer, could propose and pass amendments to the joint venture agreement, call meetings, develop rules and procedures for holding meetings and votes on "any matter that may be submitted for decision by the venturers in accordance with the express terms of this agreement or under provisions of the "TBOC." (Texas Business Organizations Code). Not to mention that, Sethi Petroleum, had an entire department dedicated to investor communication – including for voting. Thus the NDDF document and structure of the partnership/venture that was in place should have resulted in an answer in the negative as to "whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *SEC v. Koscot Interplanetary, Inc.*.

It is unknown whether the NDDF venturers took steps privately to track the performance of the NDDF venture to not be reliant on the managing venture. However, Plaintiff offers no evidence that none of the investors did this. (In fact, at the very minimum, even in this nascent partnership/venture, all partners took an initial vote to drill at the vicinity and agreed to communicate regularly with the Company.) But if the venturers chose to remain passive, "[t]he mere choice by a partner to remain passive is not sufficient to create a security interest." *Rivanna Trawlers Unlimited v. Thompson Trawlers Inc.*, 840 F.2d 236, 240-241 (4th Cir. 1981)(discussing *Williamson*).

The Defendant-Appellant humbly asks the Court to consider that the SEC enforcement action occurred in the initial stages of the NDDF's capitalization, as discussed in Section F, thus preventing it from becoming fully capitalized and acquiring wells and conducting business. Relatively speaking, this was not much time for the partners to exercise their powers mentioned in the NDDF offering documents. And it was, accordingly, too short a time to reasonably come to a determination that investors' powers were limited.

Plaintiff brought forth one declaration from a single partner/investor in its attempt to show that venturers had no power, but this is an insufficient number from which to extrapolate the experiences of all the venturers or to determine if the investments in the partnership/venture were securities. Notable, the aforementioned, partner-investor whose declaration was presented, as elaborated in Section G, was not even an investor in the particular partnership/venture to which this case regards. And none of the investors in the relevant partnership/venture, which had over 60 investors, were ever mentioned or (apparently) even questioned. Aside from the SEC's prosecution of this case against the Defendant and his company being overly aggressive and an abuse of its discretion, there could not have reasonably been considered by a court to be enough evidence to resolve the issue of whether the investments at issue were securities (including but not limited to the first factor of the *Williamson* test), especially on summary judgment.

Key Distinctions of Present Case from the Arcturus Case

The District Court erred when it analogized this present case with *SEC v. Arcturus Corporation*, 171 F. Supp. 3d 512 (2016). There are key factual distinctions that distinguish the two cases. Unlike the NDDF's requirement of 51%, the *Arcturus* defendant had a Joint Venture agreement that required a 60% vote of venturers to remove the managing joint venturer. Id. at 525. Also, the Arcturus defendant refused to distribute venturers contact information to other venturers; making it impossible for the venturers to communicate with each other.

The *Arcturus* defendant even labeled this contact information as "confidential." Id. When contact information was accidentally revealed to other venturers, Mr. Parvizian, an *Arcturus* defendant, threatened to sue the venturer who attempted to contact his fellow venturers. Id. In contrast to the defendant in Arcturus, in the present case, there is no evidence that the Defendant-Appellant, or his company, ever refused a request by a partner/venture to give him the contact information of his co-venturers.

There is no evidence in the present case of any defendant making such a request. In the present case, and unlike the *Arcturus* case, the Plaintiff did not show that the venturers could not have received each other's contact information or that the Defendant Appellant refused to furnish them such information. Thus, the First Williamson factor was not met on summary judgment.

The Second Williamson Factor: Whether Investors incapable of intelligently exercising his partnership or venture powers because of the inexperience of lack of knowledge in business affairs.

The oil and gas industry is so broad that professionals in that industry can have varying levels of experience and knowledge. There are vast differences between the upstream and downstream of the oil and gas business; knowledge in one area is not necessarily sufficient for the other. And yet, knowledge of the industry as a whole, or even of business and management efforts generally, could prove useful to the partnership, particularly if the partners

have different backgrounds to contribute and/or efforts are put in place for partners to continually educate themselves on matters relevant to the partnership (as was the case in the NDDF).

In determining whether investors/partners in a non-passive venture are suitable partners, the Defendant's company sought to obtain self-reported information from prospective partners. This is the easiest and cost-efficient means of evaluating someone's suitability for the partnership. The Defendant's company chose the questions and criteria they believed would be useful in determining if a prospective investor is a suitable partner. Perhaps some minds would say that the criteria chosen had some deficiencies, but should a court be capable of deciding what suitability criteria and questions would be most relevant in determining suitability for a business partnership/venture? After all, different minds may value different criteria in a prospective business partner.

The Third Williamson Factor: The Dispute of Whether Investors Maintained the Inability to Exercise Meaningful Powers

Under the third *Williamson* factor, the Court examines whether "the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture power." *Williamson v. Tucker*, 645 F.2d 404, 418 (5th Cir. 1981). In assessing the third Williamson factor, a court may consider "the representations and promises made by promoters or others to induce reliance upon their entrepreneurial abilities." *Gordon v. Terry*, 684 F.2d 736, 742 (11th Cir. 1982).

In Plaintiff's Motion for Summary Judgment, no evidence is put forth to show that venturers were reliant on Sethi Petroleum, save perhaps one or two investors' declaration (where the main complainant, David Meisenbach, was not even a partner in the NDDF itself, the NDDF being the venture that was in focus in this case). In contrast to a relationship of reliance, this Court can—and should—infer that each venturer could access publicly available third-party information to competently participate in the NDDF. Further, it is undisputed that each venturer represented that they possessed "extensive experience and knowledge in financial and business affairs such that [they were] capable of intelligently exercising management powers." ROA 3127. Each and every investor was required to complete a Suitability Questionnaire and each thereby represented and warranted to Sethi Petroleum that the information could be relied upon. ROA 123-3141.

On the weight of this undisputed evidence, the third *Williamson* factor is not present. Moreover, NDDF partners could vote out the managing partner and vote on any matter they saw fit. The Ninth Circuit held that: [O]ne who induces several others to enter into an ordinary partnership to engage in a certain commercial enterprise, in which the inducing partner is also to be the managing partner, has not sold an "investment contract" because all partners have ample powers to control and direct the activities of the one who organized the venture. Each partner is equally involved and equally at risk. *Stewart v. Ragland*, 934 F.2d 1033, 1037 (9th Cir. 1991).

In the present case, most of the partners-in-interest could have voted down all actions taken by Sethi Petroleum and could have replaced Sethi Petroleum without cause. ROA 3107. Also, the partners could have completely rewritten the joint venture agreement to their liking. ROA 3107. These abilities, taken in conjunction with an inference that each venturer had sufficient experience and knowledge to exercise their rights as partners, are such that this Court must find that the powers conferred by the NDDF Joint Venture Agreement created a

relationship wherein partners could, and did, maintain independence from Sethi Petroleum. Thus, the third *Williamson* factor cannot be found on summary judgment. Defendant asks this court to reverse the lower court's affirming of the summary judgment findings that the investments in question were securities

E. Case Law Relating to Lack of Scienter and Fraud When there is Reliance on Counsel

Business and business persons rely on counsel to guide them as to what is lawful and what could expose the business or business person to liability. In fact, several cases have shown reliance on counsel to negate scienter. See *Steel Fin. LDC v. Nomura Sec. International, Inc.,* 148 F. Appx 66, 69 (2d Cir. 2005); *Howard v. SEC,* 376 F.3d 1136, 1146-1147 (D.C. Cir. 2004); *SEC v. Steadman,* 967 F.2d 636, 642 (D.C. Cir. 1992). Moreover, in the 5th Circuit, it is established that a "good faith reliance on the advice of counsel is a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." U.S. v. Peterson, 101 F.3d 375, 381 (5th Cir. 1996). (There is also a corresponding principle regarding reliance on an accountant. U.S. S.E.C. v. Snyder, 292 Fed. Appx. 391, 406 (5th Cir. 2008).) This principal from the case law is not only rational, it is consistent with sound public policy – after all, as a matter of public policy, we should desire that business and business persons consult counsel.

With regards to the present case, it was the practice of Sameer Sethi to disclose all company business to general counsel Michael Davis for his review, advice and approval; receive legal advice on NDDF partnership documents and statements to make potential partners; and rely in good faith on that advice. Thus, given Mr. Sethi's reliance on counsel, even if Mr. Sethi made some misrepresentation as the SEC claims, he should not have been considered to have acted with scienter.

XI. Conclusions

Given that Plaintiff did not meet its burden of showing that there is no general issue of material fact regarding the truth of its allegations as to Defendant's company's relationship with major oil companies, or even as to if the investments in the NDDF were actually securities, by granting summary judgment against Defendant on the issue of misrepresentations regarding major oil companies, the District Court violated Defendant's 7th amendment constitutional rights to a trial in favor of expediency and undue deference to the SEC. The Appeals Court, similarly undermined Defendant's 7th amendment constitutional rights by affirming the District Court's decision. Thus, as a matter of law—in addition to a matter of justice and fairness—the United States Supreme Court should reverse the summary judgment finding against Defendant on the issue of misrepresentations as to major oil companies. Not only did the SEC fail to meet its burden of proof, the facts suggest that Defendant's company's representations regarding major oil companies were in fact truthful. *At the very least, the Supreme Courts should remand the issue regarding misrepresentations as to major oil companies for trial as a genuine dispute of material fact (including the sub-issue of scienter), and Defendant humbly ask the court to do so.*

Moreover, the injunctions and penalties, as well as the receivership, imposed against Defendant Sethi were results of the violations to Mr. Sethi's 7th amendment rights to trial, discussed above. *Defendant accordingly asks that such penalties and injunctions be set aside, at the very least until a trial on the merits has been completed.*

The SEC's actions against the Defendant, and the District and Appellate courts' decisions granting summary judgment, were based on the presumption that the investments Defendant's company offered were securities. However, Defendant strongly contests this, and additionally believe that the law is too unsettled with regards to the definition of a security--especially with regard to the second and third factors of the Williamson test--that it cannot be clearly determined if, under current law, Defendant's company issued and sold securities. Accordingly, a ruling of liability predicated on the assumption that Defendant's company, Sethi Petroleum LLC, offered a security would be inappropriate. At the very least, Defendant's 7th amendment rights would have demanded that the issue be set for trial.

Accordingly, Defendant asks that the summary judgment finding of fraudulent misrepresentation with scienter (as to relationships with major oil companies) against Defendant, and the finding of the investments in question being securities, be vacated. The summary judgment and its relatedly imposed penalties and injunctions (and the SEC-pushed receivership) have been greatly and unduly harmful to Defendant's reputation and have impeded Defendant from conducting business in good faith; there was in fact much more harm done to Defendant Sethi (and his family) than the fraudulent general "counsel", Michael Davis, who Mr. Sethi relied upon (and who was essentially let off the hook at the urging of the SEC so as to try to build a case for blaming the Defendant and going after his assets). **The Defendant also asks that the Supreme Court take this opportunity to clear up ambiguities in the law and to revise the Williamson analysis so that more focus is placed on non-subjective factors (such as investors' rights under the partnership/investment contract and relevant state laws, and investors' representations on suitability questionnaires) and less on subjective factors like the supposed value of each individual investor's background and expertise.** The issue of bringing clarity to the

definition of a security and consistency in its application is of utmost importance to businesses nationwide, who must make costs and risk analysis of decisions regarding whether securities laws apply.

Defendant-Appellant understands that that review of this Petition for Certiorari and issues raised therein is at the Supreme Court's complete discretion. However, Defendant-Appellant beseeches this Court to honor him by reviewing this Petition and he humbly asks the Court to grant him the relief stated above.