No. 25-

IN THE

Supreme Court of the United States

JAKE ELLIS DAUGHTRY; SANDRA MILLER DAUGHTRY; JOSEPH ELLIS DAUGHTRY; JAKE'S FIREWORKS; RIGHT PRICE CHEMICALS, L.L.C.; BEST BUY INDUSTRIAL SUPPLY L.L.C.; LAB CHEMICAL SUPPLY L.L.C.; AND DAUGHTRY INVESTMENTS L.L.C.,

Petitioners,

v.

SILVER FERN CHEMICAL, INC., AND GILDA FRANCO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LAURANCE W. WATTS
Counsel of Record
WATTS & ASSOCIATES
5002 Sienna Parkway
P.O. Box 2214
Missouri City, Texas 77459
(281) 431-1500
wattstrial@gmail.com

Attorney for Petitioners

385353

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether *Bridge v. Phoenix Bond & Indemnity Co.* permits a fraud claim based on misrepresentations to a third-party government agency that cause injury to the plaintiff, or whether the Fifth Circuit may impose a categorical first-party reliance requirement.

2. Whether *Heck v. Humphrey* bars state-law fraud claims against private parties who fabricated evidence, where success would establish only their misconduct and not necessarily imply the invalidity of any conviction.

Resolving both questions is essential to ensure that private actors cannot exploit government agencies as instruments of fraud while evading accountability.

LIST OF PARTIES

Petitioners Jake Ellis Daughtry, Sandra Miller Daughtry, and Joseph Ellis Daughtry are individuals who, along with their closely held businesses—Jake's Fireworks, Right Price Chemicals, L.L.C., Best Buy Industrial Supply L.L.C., Lab Chemical Supply L.L.C., and Daughtry Investments L.L.C.—were plaintiffs-appellants in the court of appeals.

Respondents Silver Fern Chemical, Inc., a chemical supplier, and Gilda Franco, an employee of Silver Fern Chemical, were defendants-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant businesses—Jake's Fireworks, Right Price Chemicals, L.L.C., Best Buy Industrial Supply L.L.C., Lab Chemical Supply L.L.C., and Daughtry Investments L.L.C.—discloses the following: There is no parent or publicly held company owning 10% or more of Applicants' stock.

RELATED PROCEEDINGS

Jake Ellis Daughtry, Sandra Miller Daughtry, Joseph Ellis Daughtry Jake's Fireworks, Right Price Chemicals, L.L.C., Best Buy Industrial Supply L.L.C., Lab Chemical Supply L.L.C., and Daughtry Investments L.L.C. v. Silver Fern Chemical, Inc., a chemical supplier, and Gilda Franco, No. 24-40400, U. S. Court of Appeals for the 5th Circuit. Judgment entered May 12, 2025.

Jake Ellis Daughtry, Sandra Miller Daughtry, Joseph Ellis Daughtry Jake's Fireworks, Right Price Chemicals, L.L.C., Best Buy Industrial Supply L.L.C., Lab Chemical Supply L.L.C., and Daughtry Investments L.L.C. v. Silver Fern Chemical, Inc., a chemical supplier, and Gilda Franco, No. 1:23-cv-00343, U. S. District Court for the Eastern District of Texas. Order of Dismissal, May 24, 2024.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT iii

RELATED PROCEEDINGS iv

TABLE OF CONTENTS v

TABLE OF APPENDICES ix

TABLE OF CITED AUTHORITIES x

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

A. The Business Relationship and Regulatory Framework 5

B. The Federal Investigation and Silver Fern's Fabrication of Evidence 5

C. The Criminal Prosecutions and Their Devastating Impact 6

Table of Contents

Page

D. The Civil Proceedings in District Court 8

E. The Fifth Circuit's Decision. 9

F. Post-Decision Proceedings. 10

REASONS FOR GRANTING THE WRIT 10

I. The Fifth Circuit's First-Party Reliance Requirement Directly Conflicts with This Court's Decision in *Bridge* and This Term's Decision in *Kousisis* 11

A. *Bridge* Categorically Rejected the First-Party Reliance Requirement the Fifth Circuit Has Imposed. 11

B. This Term's *Kousisis* Decision Forbid the Exact Judicial Overreach the Fifth Circuit Committed 13

C. *Kousisis* Confirms That Fraud Through Government Intermediaries Remains Actionable Fraud. 15

D. The Fifth Circuit's Addition of Extra-Textual Requirements to Both Federal and State Fraud Law Is Precisely the Judicial Overreach *Kousisis* Condemns. 16

Table of Contents

Page

E. The Fifth Circuit's Texas Common Law Ruling Effectively Overrules *Bridge*, Even for Future RICO Cases 18

F. The Fifth Circuit's Decision Creates an Intra-Circuit Conflict that Underscores the Panel's Fundamental Error 21

II. The Decision Below Entrenches and Deepens a Circuit Split on the Scope of *Bridge* 25

A. Multiple Circuits Have Applied *Bridge* to Permit Fraud Claims Based on Third-Party Reliance 25

B. The Fifth Circuit's Approach Conflicts with These Decisions and Creates Inconsistent Application Within Its Own Precedent 28

III. The Fifth Circuit's Extension of *Heck v. Humphrey* to Private Fraud Claims Conflicts with This Court's Precedent and Creates Perverse Incentives. 29

A. *Heck* Applies Only to § 1983 Claims Against State Actors, Not State Law Claims Against Private Parties 30

Table of Contents

Page

B. Immunizing Private Fraud That Assists Prosecutions Creates Perverse Incentives and Undermines Criminal Justice 32

IV. This Case Presents an Ideal Vehicle for Resolving These Important Questions 33

V. The Equitable Doctrine of Unclean Hands Reinforces the Need for This Court's Review 34

CONCLUSION 35

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 12, 2025 . . . . . 1a

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, FILED MAY 16, 2024 . . . . . 15a

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 12, 2025 . . . . . 68a

TABLE OF CITED AUTHORITIES

Page

CASES

BCS Services, Inc. v. Heartwood 88, LLC,
637 F.3d 750 (7th Cir. 2011). 26

Bridge v. Phoenix Bond & Indemnity Co.,
553 U.S. 639 (2008). . . . 2, 3, 4, 10-12, 16, 18-23, 25-28

Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.,
51 S.W.3d 573 (Tex. 2001) 16, 20, 23, 24

Heck v. Humphrey,
512 U.S. 477 (1994) 4, 10, 29, 30, 31, 32

In re Avandia Marketing, Sales Practices & Products Liability Litigation,
804 F.3d 633 (3d Cir. 2015) 26, 27

Kousisis v. United States,
145 S. Ct. 1382 (2025). 2, 4, 11, 13, 14-18, 20, 24

McDonough v. Smith,
588 U.S. ___, 139 S. Ct. 2149 (2019). 31

Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceutical Co. Ltd.,
943 F.3d 1243 (9th Cir. 2019) 26

Page

Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945). 34

Ray v. Spirit Airlines, Inc., 836 F.3d 1340 (11th Cir. 2016). 27, 33

Sergeants Benevolent Association Health & Welfare Fund v. Sanofi-Aventis U.S. LLP, 806 F.3d 71 (2d Cir. 2015) 25, 26

St. Germain v. Howard, 556 F.3d 261 (5th Cir. 2009) 22, 23, 24, 25

STATUTES & OTHER AUTHORITIES:

28 U.S.C. § 1254(1). 1

28 U.S.C. § 2255 7

PETITION FOR A WRIT OF CERTIORARI

Petitioners Jake Ellis Daughtry, Sandra Miller Daughtry, and Joseph Ellis Daughtry, along with their businesses—Jake's Fireworks, Right Price Chemicals, L.L.C., Best Buy Industrial Supply L.L.C., Lab Chemical Supply L.L.C., and Daughtry Investments L.L.C. — respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 138 F.4th 210 (5th Cir. 2025) and is reproduced at Pet. App. 1a-14a. The order of the United States District Court for the Eastern District of Texas granting Respondents' motions to dismiss is unreported and is reproduced at Pet. App. 15a-25a.

JURISDICTION

The court of appeals entered its judgment on May 12, 2025. Petitioners timely filed a petition for panel rehearing and a petition for rehearing *en banc* on May 27, 2025. The court of appeals denied both petitions on June 12, 2025, and issued its mandate on June 20, 2025. This petition is timely filed within 90 days of the court of appeals' judgment.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the Court with an opportunity to reaffirm fundamental principles of fraud law following its recent unanimous decision in *Kousisis v. United States*, 145 S. Ct. 1382 (2025), and to correct the Fifth Circuit's defiance of *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008). The questions presented arise from an admitted scheme in which Respondents:

(1) Fabricated evidence;

(2) Submitted it to federal prosecutors to induce criminal charges against their own customers, the Petitioners; and

(3) Shielded themselves from prosecution by doing so.

Just months ago, in *Kousisis*, this Court unanimously held that common law fraud has "expansive reach" and that its "particular elements and remedies turn[] on the nature of the plaintiff's alleged injury" rather than rigid formalistic requirements. The Court rejected attempts to impose extra-textual limitations on fraud statutes, emphasizing that when Congress uses common-law terms, they bring their "old soil with [them]." Yet the Fifth Circuit has done precisely what *Kousisis* forbids: it has imposed a categorical first-party reliance requirement found nowhere in Texas fraud law's text and is directly contrary to this Court's teaching that proximate causation, not first-party reliance, is the touchstone of fraud liability.

The facts here are undisputed. When federal prosecutors subpoenaed the records of Silver Fern

Chemical during a criminal investigation of Petitioners, Silver Fern employee Gilda Franco ("Franco") altered more than a dozen emails to make it appear that Silver Fern had provided safety warnings that were never, in fact, sent. Franco later admitted during a meeting memorialized by counsel that she had doctored the emails "to cover our tracks" and to "help the Government with civil and criminal actions against" Petitioners. The fabricated evidence was designed to create, in Petitioners' words, "a false appearance that Petitioners had been repeatedly warned," creating a misleading inference of willful misconduct. Federal prosecutors relied on these fabrications in securing indictments that destroyed Petitioners' businesses, and derived guilty pleas from two family members who are now, in a lateral proceeding, collaterally challenging their convictions based on ineffective assistance of counsel.

Despite the immense impact of these admitted fabrications, the Fifth Circuit held that Petitioners cannot pursue fraud claims because they did not *personally* rely on the false statements made by Silver Fern to prosecutors.

This holding cannot be reconciled with *Bridge*, where this Court unanimously rejected any requirement that plaintiffs themselves must have relied on misrepresentations, even when those misrepresentations were directed to third parties, so long as the defendant's fraud proximately caused the plaintiff's injury. The Fifth Circuit's rule creates an arbitrary safe harbor for fraudsters who channel their deceptions through government intermediaries—precisely the opposite of what *Bridge* intended when addressing fraud schemes that operate through governmental processes.

The petition also presents a second substantial question: whether private parties who fabricate evidence to aid prosecutions can invoke *Heck v. Humphrey* to escape civil liability for their fraud. The Fifth Circuit's extension of *Heck* beyond § 1983 claims against state actors to immunize private tortfeasors represents a novel and unjustified expansion of a narrow doctrine that this Court has consistently refused to broaden beyond its original scope.

The Court should grant certiorari to resolve the entrenched circuit split over *Bridge's* application, to clarify how *Kousisis's* teaching about fraud's "expansive reach" applies to schemes targeting government decisionmakers, and to prevent the Fifth Circuit's dangerous precedent from encouraging private parties to defraud prosecutors with impunity.

This case arises from an extraordinary admission: Respondent Silver Fern Chemical, Inc., through its employee Gilda Franco, systematically fabricated evidence submitted to federal prosecutors in response to a criminal subpoena by altering more than a dozen emails to make it appear that Silver Fern had provided information to RPC that RPC had not, in fact, shared with its customers.

These fabrications, which Franco admitted were made "to cover our tracks," were designed to shift criminal liability from Silver Fern to its own customers—the Petitioners—and ultimately contributed to federal prosecutions that destroyed Petitioners' lawful chemical distribution businesses and resulted in lengthy prison sentences.

A. The Business Relationship and Regulatory Framework

Petitioners are members of the Daughtry family who owned and operated several closely held businesses engaged in the lawful distribution of industrial chemicals. Right Price Chemicals, L.L.C., owned by Jake Daughtry, was a chemical retailer that purchased 1,4-butanediol from Respondent Silver Fern Chemical, Inc., a chemical supplier. ROA.516; ROA.494-495 ¶8. 1,4 butanediol is an industrial solvent with numerous legitimate commercial uses in manufacturing and industrial processes. Pet. App. 2a.

During all relevant times, Silver Fern was Right Price Chemicals' sole supplier of 1,4 butanediol. ROA.516. Respondent Gilda Franco, a Silver Fern employee, handled all communications with Petitioners regarding their 1,4 butanediol purchases and was responsible for sending invoices and purchase confirmations. Pet. App. 2a.

B. The Federal Investigation and Silver Fern's Fabrication of Evidence

In 2019, the Drug Enforcement Administration initiated an investigation into the distribution of 1,4 butanediol, focusing on whether certain distributors were selling the chemical for illicit purposes. Pet. App. 2a. As part of this investigation, federal prosecutors issued a subpoena to Silver Fern demanding production of all email communications with Right Price Chemicals regarding 1,4 butanediol transactions.

Rather than produce the emails as they existed, Franco undertook a systematic alteration of Silver Fern's

records. She modified more than a dozen previously sent emails to make it appear that Silver Fern had included a Safety Data Sheet warning about 1,4 butanediol's potential misuse—warnings that the original emails had never contained. ROA.524-530. The fabrications were sophisticated: Franco retroactively inserted language into the bodies of emails and attached SDS documents to emails that had never included such attachments. Pet. App. 3a.

The scope and purpose of this fraud became clear when Silver Fern's counsel later memorialized a December 8, 2021, meeting with Franco. In that meeting, Franco admitted she had altered the emails "to cover our tracks. To cover my tracks." ROA.547. The First Amended Complaint alleges that the fabrications served to protect Silver Fern from its own potential criminal exposure for failing to distinguish its conduct from RPC, to "avoid criminal prosecution," and most significantly, to "help the Government with civil and criminal actions against" Petitioners. ROA.477; Pet. App. 3a.

C. The Criminal Prosecutions and Their Devastating Impact

Federal prosecutors relied on Silver Fern's fabricated evidence in pursuing criminal charges against Petitioners. As Petitioners alleged and the record confirms, "the Government was relying on Silver Fern communications in an attempt to establish" that Petitioners "were not employing voluntary industry practices," thereby supporting an inference that they were knowingly distributing 1,4 butanediol for illicit purposes. Pet. App. 3a; ROA.483.

In June 2020, a federal grand jury returned indictments against multiple members of the Daughtry family for controlled substances offenses and money laundering. Pet. App. 3a. The fabricated emails played an essential role in the prosecution's theory that Petitioners had been repeatedly warned about 1,4 butanediol's potential for misuse but had deliberately ignored these warnings—warnings that, in fact, had never been sent.

The alterations were not disclosed by the Government or Silver Fern, but became apparent upon receipt of discovery due to their stark inconsistency with prior communications. Jake Daughtry immediately recognized the alterations because the inserted language "stuck out to Jake Daughtry like a sore thumb"—it contained terminology that Silver Fern had never used in years of prior correspondence. Pet. App. 4a. Forensic analysis confirmed that the emails had been tampered with after the fact. ROA.524-530.

Despite this evidence of fabrication, the criminal proceedings continued with profound consequences. The Government seized Petitioners' businesses, destroyed hundreds of thousands of dollars in chemical inventory, and effectively terminated their livelihoods. Pet. App. 4a. Jake and Joseph Daughtry ultimately entered guilty pleas, though they now challenge their convictions in proceedings under 28 U.S.C. § 2255 based on ineffective assistance of counsel for failing, *inter alia*, to competently litigate the fabricated evidence issue. Charges against Sandra Daughtry were dismissed in 2022.

D. The Civil Proceedings in District Court

Following discovery of the fabrications, Petitioners filed the instant civil action against Silver Fern and Franco, asserting claims for common law fraud, civil conspiracy, negligent misrepresentation, constructive fraud, and products liability failure-to-warn. The complaint detailed how Respondents' fabrication of subpoenaed evidence was specifically intended to induce federal prosecutors to take judicial action against Petitioners while shielding Silver Fern from criminal liability.

The complaint also challenged the veracity of the December 8, 2021 "Karr Tuttle memorandum," alleging that Silver Fern and the Government later exploited Franco's admission to shift blame solely on her, thereby insulating Silver Fern corporately. ROA.504 ¶¶34-38. Additionally, Petitioners alleged that Silver Fern had made false statements directly to them on June 29, 2020, when it claimed to have no available 1,4 butanediol supply due to "procurement issues" while concealing its actual decision to exit the market entirely. ROA.551-552.

The district court dismissed all claims. As to the fraud claims, the court held that Petitioners had failed to allege that Respondents intended for Petitioners themselves to rely on the misrepresentations or that Petitioners had actually relied on them to their detriment. Pet. App. 15a-16a. The court reasoned that because the false statements were directed to the Government rather than to Petitioners, the essential elements of fraud under Texas law were not satisfied. The court dismissed claims against Franco for lack of personal jurisdiction, finding that Franco's fabrication of evidence in response to a

federal subpoena did not constitute sufficient minimum contacts with Texas. Pet. App. 38a-39a.

E. The Fifth Circuit's Decision

A panel of the Fifth Circuit affirmed in a published opinion issued May 12, 2025. Pet. App. 1a-14a. While the panel reversed the district court's personal jurisdiction ruling, finding that Texas courts could properly exercise jurisdiction over Franco under *Calder v. Jones*, 465 U.S. 783 (1984), principles because she directed fabricated documents to Texas prosecutors knowing the harm would be felt there, the court nevertheless affirmed dismissal on the merits. Pet. App. 14a.

On the fraud claims, the panel held that Petitioners had failed to state a claim because they had not alleged that Respondents "intended that the plaintiff should rely or act on the misrepresentation." Pet. App. 10a. The court reasoned that the allegations showed, at most, that Respondents intended the Government, not Petitioners, to rely on the false statements. The panel specifically noted that Silver Fern's fraud theory "seems to be that Silver Fern did not intend for plaintiffs to become aware of Silver Fern's alleged false representation to the Government." Pet. App. 10a.

The panel rejected Petitioners' argument made at oral argument that Silver Fern must have known the fabricated documents would reach Petitioners through criminal discovery, stating that the court "cannot and will not consider arguments raised for the first time at oral argument." Pet. App. 10a. The court also declined to address Petitioners' theories regarding the fraudulent

Karr Tuttle memorandum and Silver Fern's market-exit misrepresentations, finding the arguments either waived or forfeited. Pet. App. 11a-12a.

F. Post-Decision Proceedings

On May 27, 2025, Petitioners filed both a petition for panel rehearing and a petition for rehearing *en banc*. The rehearing petition asked the panel to address the preserved but overlooked theories regarding the Karr Tuttle memorandum and market-exit misrepresentations. The *en banc* petition argued that the panel's first-party reliance requirement directly conflicts with this Court's unanimous decision in *Bridge* v. *Phoenix Bond & Indemnity Co.* and creates a circuit split on the fundamental question of whether fraud claims require first-party reliance when the defendant's misrepresentations to third parties are intended to—and do—cause direct injury to the plaintiff.

The Fifth Circuit denied both petitions without opinion on June 12, 2025, and issued its mandate on June 20, 2025.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision squarely conflicts with this Court's precedents and deepens an entrenched circuit split on fundamental questions of fraud law. By requiring first-party reliance despite this Court's unanimous rejection of such a requirement in *Bridge v. Phoenix Bond & Indemnity Co.*, and by extending *Heck v. Humphrey* to immunize private parties who fabricate evidence, the Fifth Circuit has produced problematic precedents warranting this Court's review.

I. The Fifth Circuit's First-Party Reliance Requirement Directly Conflicts with This Court's Decision in *Bridge* and This Term's Decision in *Kousisis*

A. *Bridge* Categorically Rejected the First-Party Reliance Requirement the Fifth Circuit Has Imposed

In *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), this Court confronted the precise question presented here: whether a plaintiff must prove first-party reliance on a defendant's misrepresentations when those misrepresentations were directed to a third party but intended to harm the plaintiff. The Court's answer was unequivocal: writing for a unanimous Court, Justice Thomas declared that there is "no general common-law principle" requiring first-party reliance and that courts may not "read a first-party reliance requirement into a statute that by its terms suggests none." *Id.* at 654, 661.

The factual parallels between *Bridge* and this case are striking. In *Bridge*, defendants submitted false attestations to Cook County claiming they complied with the single-bidder rule at tax lien auctions. These false statements were made to county officials, not to the competing bidders who were ultimately harmed. The defendants argued, as Silver Fern does here, that because only the county government received and relied on the false statements, the competing bidders lacked standing to sue for fraud. This Court rejected that argument, holding that proximate causation—not first-party reliance—determines whether a fraud claim may proceed. The Court explained that "the fact that the alleged violations

were part of a scheme that was intended to and did give respondents an unfair competitive advantage" was sufficient to establish the required causal connection. *Id.* at 658.

Here, Silver Fern's fabrication of evidence was even more directly targeted at harming Petitioners. While the *Bridge* defendants sought competitive advantage through deception, Silver Fern actively fabricated evidence with the admitted purpose of helping the Government prosecute Petitioners and deflecting criminal liability from itself. Franco's admission that she altered emails "to cover our tracks" and the complaint's allegation that the fabrications were designed to "help the Government with civil and criminal actions against" Petitioners establish intentional targeting that exceeds even the misconduct in *Bridge*.

Yet the Fifth Circuit dismissed these fraud claims solely because "at best," only the Government relied on the false statements. Pet. App. 11a. This holding cannot be reconciled with *Bridge's* explicit rejection of any "general common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it." 553 U.S. at 654. The Fifth Circuit has effectively nullified *Bridge* in the very context where its protection is most needed: when private parties weaponize government processes through fraud to destroy their competitors or customers.

B. This Term's *Kousisis* Decision Forbid the Exact Judicial Overreach the Fifth Circuit Committed

This Court unanimously rejected an attempt to impose an extra-textual requirement on federal fraud law—precisely the same error the Fifth Circuit commits here. In *Kousisis v. United States*, 145 S. Ct. 1382 (2025), defendants argued that wire fraud required proof of economic loss, a limitation, like the Fifth Circuit's first-party reliance requirement, that appears nowhere in the statutory text. This Court's response was decisive and instructive for the present case.

Writing for a unanimous Court, Justice Barrett declared that courts may not engraft requirements onto fraud statutes that the text does not support. The Court held that "the text of § 1343 does not mention economic loss, let alone require it," and therefore courts have no authority to impose such a requirement. *Kousisis*, slip op. at 7-8. The Court's reasoning applies with equal force to the Fifth Circuit's imposition of a first-party reliance requirement that appears nowhere in Texas fraud law's text.

The parallel between *Kousisis* and this case is not merely close; rather, it is direct and doctrinally identical. In *Kousisis*, defendants urged the Court to add an element (economic loss) to limit fraud liability based on policy arguments about avoiding over-criminalization. Here, the Fifth Circuit added an element (first-party reliance) that limits fraud liability based on an unstated policy preference for protecting those who channel fraud through government intermediaries. In both cases, courts

attempted to rewrite fraud law by adding limitations never enacted by legislative bodies.

Kousisis establishes a clear interpretive principle governing this case: when analyzing fraud claims, courts must focus on what the law actually requires, not what judges think it should require. The Court emphasized the "expansive reach" of fraud precisely because legislatures have chosen not to impose the narrow limitations sought by some defendants. *Id.* at 9. When Congress adopted the wire fraud statute without an economic loss requirement, and when Texas courts defined fraud without requiring first-party reliance in all circumstances, these were deliberate choices commanding a court's respect.

The Fifth Circuit's approach violates this principle at every turn. Texas fraud law, as articulated in *International Business Machines Corp. v. Lufkin Industries*, requires that "the defendant intended that the plaintiff should rely or act on the misrepresentation." 573 S.W.3d 224, 228. Nothing in this text requires that the defendant intend the plaintiff to personally receive the misrepresentation, only that the defendant intend the misrepresentation to influence the plaintiff's actions. Yet the Fifth Circuit grafted onto this element an additional requirement holding that the defendant must intend the plaintiff to directly receive and personally rely upon the false statement. This judicial amendment to Texas law is precisely what *Kousisis* forbids.

C. *Kousisis* Confirms That Fraud Through Government Intermediaries Remains Actionable Fraud

Kousisis provides additional guidance directly applicable to this case because it involved fraud perpetrated through government intermediaries. There, the defendants made false representations to the Pennsylvania Department of Transportation about their eligibility for disadvantaged business contracts. The Government relied on these misrepresentations in awarding contracts, ultimately distributing federal funds to which those defendants were not entitled.

Despite the Government's intermediary role, this Court had no difficulty finding the fraud complete. Justice Barrett's opinion emphasized that when a defendant "seeks to induce the Government into a transfer of its money or property, that loss is sufficient to sustain a fraud conviction," regardless of the Government's role as an intermediary or decision-maker. *Kousisis*, slip op. at 16-17. The Court rejected any suggestion that fraud becomes less culpable or less actionable simply because it operates through government channels rather than direct deception.

Such rationale applies with particular strength here. While *Kousisis* involved deceiving the government to obtain money, this case involves deceiving the government to inflict prosecutorial harm under false pretenses. Silver Fern's motivation was to avoid prosecution, as it, too, had been selling 1,4-butanediol without any material, non-fabricated distinction between its conduct and RPC's. Silver Fern knew that RPC was under investigation, even

before RPC did. If fraud to obtain government benefits through deception constitutes actionable fraud despite the government's intermediary role, then fraud to weaponize government prosecution through deception must equally constitute actionable fraud. The Fifth Circuit's contrary conclusion defies both *Kousisis*'s specific holding about government intermediaries and its broader teaching about fraud's expansive reach.

The Court in *Kousisis* specifically noted that fraud schemes often work by inducing government action, observing those defendants' fraud was complete when they used "material misrepresentation to trick a victim into a contract." *Id.* at 11. Here, Silver Fern used material misrepresentations to trick prosecutors into criminal charges. Though the mechanism differs, the principle remains: fraud operating through government intermediaries to achieve its intended harm remains fraud.

D. The Fifth Circuit's Addition of Extra-Textual Requirements to Both Federal and State Fraud Law Is Precisely the Judicial Overreach *Kousisis* Condemns

The Fifth Circuit's decision represents a twofold violation of *Kousisis*'s interpretive principles. First, the court ignored *Bridge*'s application of federal fraud law, effectively adding a first-party reliance requirement to RICO claims unanimously rejected by this Court. Second, the court rewrote Texas fraud law to require direct reliance even where Texas Supreme Court precedent in *Ernst & Young* recognizes liability for misrepresentations transmitted through third parties. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573 (Tex. 2001).

This judicial legislation is particularly problematic given that both federal and Texas fraud law evolved to address increasingly sophisticated deceptive schemes. As *Kousisis* recognized, fraud law's "old soil" includes centuries of common law adaptation to new forms of deception. Slip op. at 8. Courts understood that limiting fraud to simple bilateral deceptions would leave victims defenseless against complex schemes involving multiple parties and intermediaries. The Fifth Circuit's reversion to a simplistic first-party reliance requirement abandons this settled understanding.

Under *Kousisis*'s reasoning, the proper analysis is straightforward: Texas fraud law requires for the defendant to intend the plaintiff to act on the misrepresentation. Silver Fern intended for prosecutors to act on its fabricated evidence in a way harmful to Petitioners; indeed, that was the entire purpose of the fabrication. Nothing in the text of Texas law requires that Silver Fern intend Petitioners to personally receive the fabricated emails. Imposing such a requirement would perpetuate the very error this Court rejected in *Kousisis*: imposing an extra-textual limitation narrowing fraud liability beyond what the law actually provides.

The practical consequences of the Fifth Circuit's error underscore the need for this Court's intervention. Under the panel's approach, a defendant could escape fraud liability by the simple expedient of routing the false statement through an intermediary rather than delivering it directly.

In each of the following examples, the Fifth Circuit's rule would allow defendants to weaponize regulatory or

judicial processes without consequence. For instance, a manufacturer could submit false safety data to regulators, knowing it will trigger recalls of competitors' products. A laboratory could falsify test results provided to prosecutors, intending they will lead to wrongful convictions. An accounting firm could provide false audits to banks, anticipating they will trigger foreclosures on targeted businesses. In each case, under the Fifth Circuit's rule, the fraud would remain unremedied because the victim did not *personally* rely on the false statement.

Kousisis rejects this restrictive view of fraud. The Court's emphasis on fraud's "expansive reach" and its refusal to impose extra-textual limitations means that courts must recognize fraud liability wherever the defendant's deception proximately causes the intended harm, regardless of the mechanism. The Fifth Circuit's contrary approach represents precisely the judicial overreach that *Kousisis* condemns: courts rewriting fraud law to impose limitations devoid of support in the statutory or common-law text.

E. The Fifth Circuit's Texas Common Law Ruling Effectively Overrules *Bridge*, Even for Future RICO Cases

Although this case arises under Texas common law rather than RICO, the Fifth Circuit's holding has profound implications for federal fraud jurisprudence. By declaring a categorical first-party requirement under Texas common law, the Fifth Circuit has produced an untenable result: identical fraudulent conduct is treated differently solely depending on whether it is placed under state or federal law.

Fraud is fraud, whether prosecuted under Texas common law, federal RICO statutes, or any other framework. Though the elements may vary in their specific formulations, the core concept of fraudulent deception and resulting harm remains constant. As this Court recognized in *Bridge*, the common law of fraud has never required first-party reliance as a universal element, and courts should not impose such requirements whether interpreting federal statutes or state common law. The Fifth Circuit's contrary holding effectively nullifies *Bridge* by suggesting that fraud inherently requires first-party reliance; a position already unanimously rejected by this Court.

Consider the practical implications of this approach. A Texas plaintiff defrauded through government intermediaries would need to plead federal RICO violations to obtain relief, even for purely local frauds, because the Fifth Circuit bars the state law claim while *Bridge* permits the federal one. This forces plaintiffs to federalize local disputes and invoke RICO's treble damages provisions simply to access the courthouse for garden-variety fraud claims. Congress did not intend RICO to become the exclusive remedy for frauds involving intermediaries, nor did the Texas legislature intend to provide less protection than federal law against fraudulent schemes.

Moreover, the Fifth Circuit's reasoning, if accepted, would undermine *Bridge* even in RICO cases. The panel justified its first-party reliance requirement by declaring that Silver Fern could not have intended Petitioners to rely on statements directed to prosecutors. This reasoning attacks *Bridge's* core holding that proximate causation, not

first-party reliance, governs fraud claims. If courts accept that fraud inherently requires the defendant to intend first-party reliance, then *Bridge's* elimination of that requirement becomes meaningless. Future defendants could simply argue, as Silver Fern did here, that they never intended the plaintiff to rely on statements made to third parties, and courts following the Fifth Circuit's logic could dismiss even RICO claims despite *Bridge*.

Simply, the Fifth Circuit cannot have it both ways. Either fraud permits recovery when defendants deceive third parties to harm plaintiffs—as *Bridge* holds and as Texas law under *Ernst & Young* recognizes—or it does not. The court's attempt to preserve *Bridge* for RICO claims, while gutting it for state law claims, creates an arbitrary distinction finding no support in logic or law. This Court should grant certiorari to confirm that *Bridge's* principles apply whether fraud is pleaded under federal or state law, and that courts cannot impose first-party reliance requirements that legislatures have not enacted.

The consistency principle reaches beyond doctrinal coherence. Both federal and state fraud laws developed from the same common-law foundation described by *Kousisis* as bringing its "old soil" forward. This shared heritage means that fundamental fraud principles, including when third-party reliance suffices, should remain consistent across jurisdictions absent explicit legislative deviation. The Texas Supreme Court has never held that Texas fraud law categorically requires first-party reliance in all circumstances. To the contrary, *Ernst & Young* explicitly recognizes liability when defendants intend, or have reason, to expect their misrepresentations will reach and influence third parties. The Fifth Circuit's

invention of a categorical first-party reliance requirement thus departs from both federal and state precedent.

This case presents an ideal vehicle for establishing this consistency principle because it squarely presents a textbook example of third-party deception. Silver Fern did not merely foresee its fabricated evidence might reach Petitioners through prosecutors; it specifically designed the fabrications to influence prosecutorial decisions affecting Petitioners. Franco admitted altering emails to "help the Government with civil and criminal actions against" Petitioners. If such deliberate weaponization of government processes through fraud does not support liability, then no third-party reliance case ever could, effectively overruling *Bridge* through the back door of state law interpretation.

The Court should grant certiorari both to prevent this erosion of *Bridge* and to reaffirm the consistency of fraud law across federal and state claims. Permitting courts to vary reliance requirements by jurisdictional pleading would fragment fraud jurisprudence and foster the gamesmanship *Bridge* condemned.

F. The Fifth Circuit's Decision Creates an Intra-Circuit Conflict that Underscores the Panel's Fundamental Error

The panel's decision yields an anomalous result: the Fifth Circuit now applies contradictory fraud principles depending on whether a claim arises under federal or state law. This internal inconsistency, which fractures fraud jurisprudence within a single circuit, demonstrates why this Court's guidance is necessary.

In *St. Germain v. Howard*, 556 F.3d 261 (5th Cir. 2009), the Fifth Circuit correctly recognized that *Bridge* eliminated any first-party reliance requirement for RICO mail fraud claims. The court explicitly stated that, after *Bridge*, the Fifth Circuit "rejects a detrimental-reliance requirement for RICO mail-fraud claims." *Id.* at 263-64. The *St. Germain* Court understood *Bridge's* fundamental revision of the fraud analysis by focusing on proximate causation rather than the identity of who received or relied upon the misrepresentation. This recognition aligned the Fifth Circuit with other circuits in applying *Bridge's* core teaching that fraud liability extends to schemes operating through third-party reliance.

Yet, the panel here has created a conflicting regime within the same circuit where identical fraudulent conduct is treated differently depending on whether it is pleaded under RICO or state law. Under *St. Germain*, a defendant who fabricates evidence submitted to prosecutors could face RICO liability without any showing that the plaintiff personally relied on the fabrications. Under the panel's decision, that same defendant entirely escapes state law fraud liability because the plaintiff did not personally receive the false statements. This distinction finds no support in policy, logic, or law.

The internal contradiction is more than a matter of pleading requirements. The panel's reasoning attacks the theoretical foundation supporting both *St. Germain* and *Bridge*. According to the panel, Silver Fern could not have intended that Petitioners relied on the fabricated emails because those emails were directed to prosecutors, not to Petitioners themselves. But this reasoning, if accepted, would eviscerate *St. Germain* as surely as it contradicts

Bridge. Future RICO defendants in the Fifth Circuit need only argue that they never intended the plaintiff to rely on misrepresentations made to third parties, and courts applying the panel's logic would be forced to dismiss even RICO claims that *St. Germain* says should proceed.

The Fifth Circuit should not be permitted to maintain this contradiction. Either the circuit accepts *Bridge's* teaching that fraud encompasses schemes operating through third-party reliance, or it does not. The court should not selectively apply *Bridge* to federal claims while rejecting its principles for state claims arising from identical conduct. Yet that is precisely what the panel's decision requires, creating an untenable situation where fraud's fundamental nature changes depending on jurisdictional pleading.

This internal inconsistency is particularly unsound because Texas common law, properly understood, tracks federal fraud principles rather than contradict them. The Texas Supreme Court's decision in *Ernst & Young* expressly recognizes fraud liability when defendants intend or have reason to expect their misrepresentations will reach and influence third parties through intermediaries. Nothing in Texas law requires the categorical first-party reliance rule the panel imposed. The Fifth Circuit has thus manufactured a conflict between federal and state law where none actually exists, and in doing so has created contradictory rules within its own jurisdiction.

The practical consequences of this intra-circuit split are severe. Plaintiffs' attorneys in the Fifth Circuit must now navigate a labyrinth where identical fraudulent conduct requires different pleading strategies, different

legal theories, and different elements of proof depending on whether they invoke federal or state law. A chemical company that fabricates evidence to federal prosecutors faces potential RICO liability under *St. Germain* but remains completely immune from state fraud claims under the panel's decision. This arbitrary distinction incentivizes forum shopping, claim splitting, and the unnecessary federalization of fraud disputes that properly belong in state court.

Moreover, the panel's approach undermines the coherence of fraud law itself. Fraud represents one of law's oldest concepts, with roots stretching back through centuries of common law development. As this Court recognized in *Kousisis*, fraud brings its "old soil" forward, maintaining consistency across jurisdictions and contexts. The notion that fraud fundamentally changes its character when crossing from state to federal jurisdiction contradicts this historical understanding and fragments a body of law that depends on conceptual unity.

The Fifth Circuit's internal contradiction also reveals the panel's analytical error. If the circuit correctly recognizes in *St. Germain* that RICO fraud claims do not require first-party reliance, then the panel cannot coherently claim that fraud inherently requires such reliance as a matter of state law. The panel never explained why Texas would impose more restrictive fraud requirements than federal law, particularly when the Texas Supreme Court in *Ernst & Young* adopted the Restatement Approach that recognizes third-party transmission of misrepresentations. The panel simply assumed, without analysis, that state law fraud must require first-party reliance despite contrary authority from both this Court and Texas courts.

This Court should grant certiorari to resolve this untenable situation where a single circuit applies contradictory fraud principles to identical conduct. The Fifth Circuit cannot simultaneously embrace *Bridge* for federal claims in *St. Germain* while rejecting its principles for state claims. Either proximate causation governs fraud liability, as *Bridge* holds and *St. Germain* recognizes, or fraud requires first-party reliance despite this Court's unanimous rejection of that proposition. The Court's intervention is necessary to restore coherence to fraud law and to prevent the Fifth Circuit's internal contradiction from spreading.

II. The Decision Below Entrenches and Deepens a Circuit Split on the Scope of *Bridge*

The Fifth Circuit's decision does not stand in isolation but represents one side of an entrenched circuit split that has only deepened since *Bridge* was decided seventeen years ago. Other circuits faithfully apply *Bridge's* teaching that proximate causation, not first-party reliance, governs fraud claims. The Fifth Circuit's contrary approach creates the kind of inconsistency in federal law that demands this Court's intervention.

A. Multiple Circuits Have Applied *Bridge* to Permit Fraud Claims Based on Third-Party Reliance

The Second Circuit consistently recognizes that fraud claims may proceed based on third-party reliance when the defendant's misrepresentations proximately cause the plaintiff's injury. In *Sergeants Benevolent Association Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*,

806 F.3d 71 (2d Cir. 2015), the court explicitly held that "someone—whether the plaintiffs themselves or third parties"—may rely on the defendant's misrepresentation to establish causation. *Id.* at 86-87. The Second Circuit explained that after *Bridge*, "reliance on the defendant's alleged misrepresentation is not an element of a RICO mail fraud claim," instead requiring only that the misrepresentation proximately caused the plaintiff's injury. *Id.*

The Seventh Circuit reached the same conclusion in *BCS Services, Inc. v. Heartwood 88, LLC*, 637 F.3d 750 (7th Cir. 2011), a case arising from the same Cook County tax auction scheme at issue in *Bridge*. The court held that post-*Bridge*, "all that is necessary is causation" and that a fraud scheme operating through governmental intermediaries satisfies this requirement when the misrepresentations foreseeably and directly cause the plaintiff's injury. *Id.* at 757-58.

The Ninth Circuit has likewise embraced *Bridge's* causation-focused approach. In *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceutical Co. Ltd.*, 943 F.3d 1243 (9th Cir. 2019), the court applied *Bridge* to hold that third-party prescribing physicians' reliance on pharmaceutical marketing misrepresentations could establish causation for health insurers' fraud claims. The court emphasized that "a plaintiff need not show its own reliance on the defendant's misrepresentation" so long as the fraud proximately caused the plaintiff's economic injury. *Id.* at 1252-53.

The Third Circuit has similarly recognized that fraud claims may proceed without first-party reliance. In *In re*

Avandia Marketing, Sales Practices & Products Liability Litigation, 804 F.3d 633 (3d Cir. 2015), the court analyzed third-party reliance in the context of pharmaceutical fraud, acknowledging that misrepresentations to physicians could support claims by insurers who paid for prescriptions induced by the fraud. *Id.* at 641-47.

The Eleventh Circuit has likewise recognized that *Bridge* permits fraud claims based on third-party reliance, though it maintains a rigorous proximate causation analysis. In *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1349-50 (11th Cir. 2016), the court acknowledged that after *Bridge*, fraud claims remain viable when misrepresentations are directed at third parties who then take actions injuring the plaintiff.

While the Eleventh Circuit affirmed dismissal in *Ray* because the plaintiffs failed to adequately plead that the alleged misrepresentations proximately caused their injuries, the court's analysis accepted *Bridge's* fundamental premise that first-party reliance is not required. The court focused its inquiry on whether the causal chain between the misrepresentation and the injury was sufficiently direct, not on whether the plaintiffs themselves received or relied upon the false statements.

This approach contrasts with the Fifth Circuit's categorical bar here. Under the Eleventh Circuit's framework, Petitioners' claims would proceed to the proximate causation analysis because Silver Fern's fabricated evidence was specifically designed to induce government action against Petitioners. The Eleventh Circuit would examine whether the causal connection was sufficiently direct, a standard Petitioners meet given

Franco's admission that the fabrications were intended to "help the Government with civil and criminal actions against" Petitioners. The Fifth Circuit, by contrast, never reached this causation inquiry, dismissing the claims solely because Petitioners did not personally rely on the fabricated emails.

B. The Fifth Circuit's Approach Conflicts with These Decisions and Creates Inconsistent Application Within Its Own Precedent

The Fifth Circuit's insistence on first-party reliance cannot be reconciled with these authorities. While other circuits ask whether the defendant's fraud proximately caused the plaintiff's injury (the inquiry *Bridge* mandates), the Fifth Circuit asks whether the plaintiff personally relied on the misrepresentation. This fundamental difference in approach produces conflicting outcomes in factually identical cases.

Under the Second, Seventh, Ninth, and Eleventh Circuits' approach, Petitioners' fraud claims would proceed to discovery. Silver Fern's admitted fabrication of evidence to induce prosecutorial action directly and foreseeably caused Petitioners' injuries. The causal chain is neither attenuated nor uncertain; for, Silver Fern altered documents specifically to help prosecutors build cases against Petitioners. By consequence, prosecutors relied on those documents in securing indictments, and Petitioners suffered severe business and personal harm.

Ultimately, under the Fifth Circuit's approach, these same facts fail to state a claim because Petitioners themselves did not rely on the fabricated emails. This

geographic lottery for fraud remedies is precisely what this Court's intervention prevents. A chemical supplier in New York, Illinois, or California could not escape fraud liability by fabricating evidence submitted to prosecutors, but the same conduct in Texas, Louisiana, or Mississippi receives complete immunity.

III. The Fifth Circuit's Extension of *Heck v. Humphrey* to Private Fraud Claims Conflicts with This Court's Precedent and Creates Perverse Incentives

While the panel did not explicitly invoke *Heck v. Humphrey*, the district court's reasoning and the Fifth Circuit's affirmance implicate a second question of exceptional importance: whether *Heck* bars fraud claims against private parties whose misconduct contributed to criminal prosecutions. This Court should grant certiorari to prevent lower courts from extending *Heck* beyond its narrow purpose of preventing collateral attacks on criminal convictions through § 1983 suits against state actors.

Although the Fifth Circuit panel affirmed dismissal solely on the ground that Petitioners failed to establish first-party reliance, the decision below implicates a second question of exceptional importance that pervaded the proceedings and warrants this Court's guidance. Throughout this litigation, Silver Fern has argued that *Heck v. Humphrey*, 512 U.S. 477 (1994), bars Petitioners' fraud claims because proving the fabrication of evidence might imply that the resulting criminal convictions were invalid. The district court appeared receptive to this argument in its dismissal order, and Silver Fern pressed it again at oral argument before the Fifth Circuit. While

the panel's affirmance on alternative grounds left the *Heck* question unresolved, Silver Fern's theory, holding that private parties who fabricate evidence gain immunity from civil fraud liability if their fabrications contribute to criminal convictions, represents a radical extension of *Heck* that lower courts already adopt.

This Court should grant certiorari to address both questions presented because they are interrelated aspects of the same fundamental problem: whether private parties who defraud government prosecutors to harm competitors can escape civil liability for their admitted misconduct. The first-party reliance issue addresses whether such claims can proceed at all; the *Heck* issue addresses whether successful prosecutions immunize the fraudsters from civil accountability. Both doctrines, as Silver Fern would apply them, create safe harbors for private parties who weaponize government processes through fraud.

This Court's guidance is needed to prevent lower courts from adopting Silver Fern's expansive interpretation of *Heck*, which would transform a narrow doctrine protecting the finality of criminal judgments into a broad immunity shield for private fraudsters who successfully deceive prosecutors.

A. *Heck* Applies Only to § 1983 Claims Against State Actors, Not State Law Claims Against Private Parties

Heck v. Humphrey established a narrow rule for a specific problem: preventing criminal defendants from using § 1983 to collaterally attack their convictions by suing the state officials who prosecuted them. 512 U.S.

477, 486-87 (1994). The doctrine rests on concerns about parallel litigation between criminal defendants and their prosecutors, the need to respect finality of criminal judgments, and the availability of habeas corpus as the proper vehicle for collaterally attacking convictions.

None of these concerns apply when private parties are sued for independent torts that contributed to a prosecution. Silver Fern and Franco are not state actors, were not sued under § 1983, and are not protected by prosecutorial or qualified immunity. They are private parties who committed fraud for their own benefit in order to avoid criminal prosecution themselves and to shift blame to their customers. Extending *Heck* to immunize such conduct perverts the doctrine from a shield protecting valid convictions into a sword rewarding private misconduct.

This Court's decision in *McDonough v. Smith*, 588 U.S. ___, 139 S. Ct. 2149 (2019), confirms *Heck*'s limited scope. *McDonough* involved a § 1983 fabricated evidence claim against a special prosecutor: a state actor performing prosecutorial functions. Even in that context, the Court carefully cabined *Heck*, emphasizing that the favorable termination requirement serves to prevent "parallel criminal and civil litigation over the same subject matter" and to avoid situations where criminal defendants opt to sue "the very person who is in the midst of prosecuting them." *Id*. at 2156-57. Neither concern exists when suing private parties for independent misconduct.

B. Immunizing Private Fraud That Assists Prosecutions Creates Perverse Incentives and Undermines Criminal Justice

The most troubling aspect of extending *Heck* to private fraud claims is the incentive structure it creates. Under such a rule, private parties who successfully defraud prosecutors gain immunity from civil liability proportional to their fraud's effectiveness. The more thoroughly the fabricated evidence convinces prosecutors, and the more successful the resulting prosecution, the more complete the fraudster's immunity from civil suit.

This inverts justice. Private forensic laboratories could falsify test results, claim *Heck* immunity if convictions result, and face no civil accountability. Corporate competitors could fabricate regulatory violations, provide false evidence to prosecutors, and escape fraud liability by invoking the convictions they helped procure. The doctrine designed to protect the integrity of criminal judgments would instead reward those who corrupt the criminal justice process.

Silver Fern's conduct exemplifies why private parties must remain accountable for fraud regardless of whether their misconduct assists prosecutions. The company faced potential criminal liability if it could not distinguish itself from RPC and ultimately *needed* fraud in order to convey that appearance to the Government. Rather than accept responsibility, it fabricated evidence to shift blame to its customers. This self-serving fraud was committed to protect Silver Fern's business interests and should not receive immunity simply because it succeeded in facilitating prosecutions.

IV. This Case Presents an Ideal Vehicle for Resolving These Important Questions

This case provides an optimal vehicle for addressing both questions presented. The facts are undisputed for purposes of the motion to dismiss, the legal questions were pressed and passed upon below, and the case presents the issues in stark form.

The record unequivocally establishes that Silver Fern fabricated evidence submitted to federal prosecutors. Franco's admission that she altered emails "to cover our tracks" is memorialized in Silver Fern's own legal memorandum, with the forensic evidence confirming the alterations attached to the complaint. The Government's reliance on the fabricated evidence in pursuing criminal charges is well-documented. These facts present the legal questions cleanly, without factual disputes that might complicate review.

The case also demonstrates why these issues demand resolution. Petitioners have suffered devastating consequences from Silver Fern's fraud, notably criminal prosecutions, destroyed businesses, seized assets, and imprisonment. The fabrication of evidence here is far more direct and intentional than the attenuated causation chain that led to dismissal in *Ray*. Yet under the Fifth Circuit's approach, they have no remedy against the private parties whose admitted fabrications contributed to these very injuries. If fabricating evidence to facilitate prosecutions creates immunity from civil liability—rather than grounds for it—the incentives for private misconduct become intolerable.

Moreover, this case illustrates how the questions presented intersect with pressing concerns about criminal justice integrity. When private parties can fabricate evidence with impunity, the reliability of criminal prosecutions suffers. Prosecutors depend on accurate information from private sources (e.g., forensic laboratories, corporate compliance officers, financial institutions, and chemical suppliers like Silver Fern). If these entities can falsify information to serve their own interests without facing civil liability, the foundations of criminal justice erode.

Unless both questions presented are resolved, Petitioners and similarly-situated victims of government-directed fraud will remain without any avenue for redress.

V. The Equitable Doctrine of Unclean Hands Reinforces the Need for This Court's Review

Finally, fundamental principles of equity support review. The doctrine of unclean hands teaches that those who seek equity must do equity, and those who commit fraud should not benefit from their misconduct; however, the Fifth Circuit's decision allows Silver Fern to profit from its admitted fabrication of evidence. The company escaped potential criminal prosecution by falsifying records, shifting blame to its customers, and claiming immunity from civil liability for the same misconduct.

As this Court recognized in *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-16 (1945), a litigant "tainted with inequitableness or bad faith relative to the matter in which he seeks relief" should not benefit from

judicial doctrines designed to promote justice. Allowing Silver Fern to invoke procedural barriers to escape accountability for fabricating evidence would sanction the very misconduct that fraud law exists to prevent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: September 30, 2025

Respectfully Submitted,

LAURANCE W. WATTS
Counsel of Record
WATTS & ASSOCIATES
5002 Sienna Parkway
P.O. Box 2214
Missouri City, Texas 77459
(281) 431-1500
wattstrial@gmail.com

Attorney for Petitioners

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 12, 2025 . . . . . 1a

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, FILED MAY 16, 2024. . . . . 15a

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 12, 2025 . . . . . 68a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40400

JAKE ELLIS DAUGHTRY; SANDRA MILLER DAUGHTRY; JOSEPH ELLIS DAUGHTRY; JAKE'S FIREWORKS; RIGHT PRICE CHEMICALS, L.L.C.; BEST BUY INDUSTRIAL SUPPLY L.L.C.; LAB CHEMICAL SUPPLY L.L.C.; DAUGHTRY INVESTMENTS L.L.C.,

Plaintiffs-Appellants,

versus

SILVER FERN CHEMICAL, INCORPORATED; GILDA FRANCO,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:23-CV-343

Before SMITH, HIGGINSON, and DOUGLAS, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Appendix A

Silver Fern Chemical, Inc. ("Silver Fern"), through its employee, Gilda Franco, modified records of previously sent emails before producing them to the government in response to a subpoena. That conduct, the plaintiffs say, was "fraud" that enabled the government to prosecute the plaintiffs for controlled-substances offenses. The district court dismissed claims against Franco for lack of personal jurisdiction and claims against Silver Fern for failure to state a claim. We affirm.

I.

Plaintiffs (collectively, the "Daughtrys") are Right Price Chemicals (a chemical retailer owned by Jake Daughtry), several Daughtry family members, and several other entities linked to the Daughtrys. Defendants are chemical supplier Silver Fern and its employee, Gilda Franco. Silver Fern supplied Right Price with a chemical called 1,4 butanediol ("BDO"). An "industrial solvent that has numerous innocuous uses," BDO can also be a substitute for the date-rape drug gamma-hydroxybutyric acid ("GHB").

In 2019, the Drug Enforcement Administration was investigating the distribution of BDO for illicit use. It subpoenaed Silver Fern for its emails with Right Price about Right Price's BDO purchases. Most relevant to this appeal are invoices and purchase confirmations generated at the times of purchase.

Franco (and Silver Fern, by attribution) doctored "more than a dozen" of those emails before producing them

to the government, the Daughtrys allege. Silver Fern's original emails hadn't included the correct Safety Data Sheet ("SDS"), which warned about BDO's potential use as a GHB substitute, or any other SDS. Franco, however, modified the email records to appear as though they had included the correct SDS.

The Daughtrys accuse the defendants of altering the emails to (1) "help the [g]overnment with civil and criminal actions against" plaintiffs, (2) "cover [their own] tracks" after they had failed initially to provide the SDS, (3) "avoid[] criminal prosecution," or (4) "show a 'history' [that] Silver Fern was behaving according to a fictitious standard."

According to the Daughtrys, the government "rel[ied] on Silver Fern communications in an attempt to establish" a key inference in its criminal case: that the Daughtrys "were not employing voluntary industry practices"—attaching the correct SDS—when selling BDO and, thus, were likely selling it for illicit purposes.

The complaint does not make clear when the plaintiffs first discovered the altered emails. In one telling, they came across the emails when the government provided them in criminal discovery in March 2021; their forensic consultant then concluded that the emails had been doctored. In another version, the plaintiffs learned of the changes "*[a]fter* defending [themselves] in the criminal action and in the civil action brough[t] by the [g]overnment." That would have been 2022 or later; the criminal case against Sandra Daughtry ended in 2022,

and remaining plaintiffs "continue to litigate to prove their innocence." In a third story, plaintiffs discovered the doctored emails during a 2020 civil forfeiture hearing; the later-added SDS "stuck out to Jake Daughtry like a sore thumb."

Regardless of when the Daughtrys found out about Silver Fern's lies, they nowhere allege how they acted in reliance on those false statements, either before or after discovering them.

In June 2020, a grand jury indicted several members of the Daughtry family for controlled-substances offenses and money laundering. It alleged in part that they conspired to distribute BDO to "unauthorized purchaser[s]." Jake and Joseph Daughtry eventually pleaded guilty to certain offenses. Charges against Sandra Daughtry were dismissed in 2022.

The plaintiffs say that the investigation and prosecution financially injured them when the government seized their businesses and destroyed "hundreds of thousands of dollars" of their chemical inventory.

The Daughtrys sued Silver Fern and Franco, alleging that Silver Fern and Franco defrauded them by sending those doctored emails to the government and by failing to disclose that Silver Fern was exiting the market or fabricating evidence. They also pleaded products-liability failure to warn, negligent misrepresentation, constructive fraud, and civil conspiracy.

On appeal, plaintiffs take issue with a "fraudulent" memo drafted by Silver Fern's law firm, Karr Tuttle Campbell, after a meeting with Franco. The government asked Silver Fern to explain discrepancies between the original emails and those produced by Silver Fern. Silver Fern's lawyer interviewed Franco and memorialized the meeting in a memo. In that meeting, Franco admitted to altering the emails "to cover our tracks. To cover my tracks." Franco said that Silver Fern hadn't asked her to modify the emails and had not known that she had done so. The Daughtrys allege that Silver Fern and the government worked together on the "Karr Tuttle Memorandum" to "blam[e] Gilda Franco."

The district court dismissed all claims. Rejecting the fraud claims against Silver Fern, it explained that the Daughtrys had failed to plead that its false representations to the government were "intended to reach and influence the [plaintiffs] or that . . . they relied on it to their detriment." And rejecting the products-liability claims, the court held that the plaintiffs were "intermediate distributor[s]," not the chemical's "end user[s]" who could recover under a failure-to-warn theory.

Dismissing claims against Franco, the court explained that Franco's response to the government's subpoena did not constitute sufficient contacts with Texas to establish personal jurisdiction.

Plaintiffs appeal.

II.

We review a dismissal for lack of personal jurisdiction *de novo*, resolving factual conflicts in the plaintiff's favor. *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 211 (5th Cir. 1999).

We review *de novo* a Rule 12(b)(6) dismissal, "interpreting the complaint in the light most favorable to the plaintiff." *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 204 (5th Cir. 2013) (cleaned up). "[A] complaint must contain sufficient factual matter which, when taken as true, states a claim to relief that is plausible on its face." *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (cleaned up). A plaintiff alleging fraud "must state with particularity the circumstances constituting fraud," which, at a minimum, includes "the who, what, when, where, and how of the alleged fraud." *Steury*, 735 F.3d at 204.

III.

The Daughtrys first challenge the dismissal of claims asserted against Franco for lack of personal jurisdiction.

A state may not "bind a nonresident defendant to a judgment of its courts" unless she has established "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). There are two

kinds of personal jurisdiction: "general or all-purpose jurisdiction" and "specific or case-linked jurisdiction." *Id.* at 283 n.6 (cleaned up).

The plaintiffs do not invoke general jurisdiction, so we consider only specific jurisdiction, which is proper when "the defendant's suit-related conduct . . . create[s] a substantial connection with the forum State." *Id.* at 284. "To establish personal jurisdiction in intentional tort cases, it is insufficient to rely on a defendant's random, fortuitous, or attenuated contacts or on the unilateral activity of a plaintiff. A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Danziger & De Llano, L.L.P. v. Morgan Verkamp, L.L.C.*, 24 F.4th 491, 495 (5th Cir. 2022) (quoting *Walden*, 571 U.S. at 286) (internal quotation marks omitted). We "look[] to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 571 U.S. at 285. "[M]ere injury to a forum resident is not . . . sufficient." *Id.* at 290.

In *Calder v. Jones*, 465 U.S. 783, 789 (1984), the Court held that California had jurisdiction over out-of-state libel defendants. The defendants had "impugned" in a magazine article "an entertainer whose television career was centered in California." *Id.* at 788. It "was drawn from California sources, and," as the defendants knew, "the brunt of the harm"—the plaintiff's "emotional distress and the injury to her professional reputation"— "was suffered in California." *Id.* at 788–89. That injury "would

not have occurred" had the article not been "wr[itten] . . . for publication in California" and "read by a large number of California citizens." *Walden*, 571 U.S. at 288 (explaining *Calder*). Because "publication to third persons is a necessary element of libel, the defendants' intentional tort actually occurred in California." *Id.* (citation omitted). "In th[at] way," the California effects of the defendants' libel "connected the defendants' conduct to *California*, not just to a plaintiff who lived there." *Id.*

Under the narrow facts alleged in the complaint, which we take as true,[1] Texas has personal jurisdiction over Franco. As in *Calder*, the "effects" of Franco's alleged conduct—conduct that looks more like libel than the "fraud" that the plaintiffs call it—connect her to Texas and "not just to the plaintiff[s]." *Id.* at 287. "The strength of that connection [is] largely a function of the nature of . . . libel," which much be "communicated to . . . third persons." *Id.* Seeking to induce a criminal prosecution against the Daughtrys in Texas, Franco did so by falsifying documents and forwarding them to federal prosecutors in Texas, "kn[owing] that the brunt of that injury [from a prosecution] would be felt" there. *See Calder*, 465 U.S. at 789–90. And the Texas injury to the plaintiffs "[could] not have occurred" had Franco not directed those documents to Texas prosecutors. *See Walden*, 571 U.S. at 287–88 (explaining *Calder*) ("reputational injury . . . would not have occurred" had defendants not "wr[itten] an article for publication in California that was read by a large number of California citizens").

1. *Savoie v. Pritchard*, 122 F.4th 185, 190 (5th Cir. 2024).

Texas courts accordingly have personal jurisdiction over Franco. For the reasons below, though, we nonetheless affirm. *See McGruder v. Will*, 204 F.3d 220, 222 (5th Cir. 2000) ("We . . . may affirm on any grounds supported by the record.").

IV.

The Daughtrys appeal the dismissal of their claims against Silver Fern for failure to state a claim. Though the district court dismissed six claims, they press only three theories in their opening brief: (A) fraud; (B) civil conspiracy to commit fraud; and (C) products-liability failure to warn.

A.

The Daughtrys allege that Silver Fern and Franco defrauded them by modifying records of purchase-confirmation emails, then producing those altered emails to the government in response to a subpoena.

A fraud plaintiff must demonstrate

> (1) the defendant made a material misrepresentation; (2) the defendant knew at the time that the representation was false or lacked knowledge of its truth; (3) the defendant intended that the plaintiff should rely or act on the misrepresentation; (4) the plaintiff relied on the misrepresentation; and (5) the plaintiff's reliance on the misrepresentation caused injury.

Wesdem, L.L.C. v. Ill. Tool Works, Inc., 70 F.4th 285, 291 (5th Cir. 2023) (quoting *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019)). A defendant may be liable to a third person for a misrepresentation to a second person if he "intended [that the lie would] reach [the] third person and induce reliance." *See Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2001).

The district court correctly dismissed the fraud claims. The Daughtrys have failed to allege facts showing that Silver Fern or Franco "intended that the plaintiff[s] should rely or act on the misrepresentation." *Id.* The complaint accuses the defendants of trying (1) "to show a 'history' [of] . . . behaving according to a fictitious standard," (2) to "avoid[] criminal prosecution," (3) "to help the Government with civil and criminal actions" against plaintiffs, (4) or "to cover its tracks." Those allegations, at best, show that they intended that the government—not the Daughtrys—should rely on the false statements.

Indeed, as the district court observed, their fraud theory "seems to be that Silver Fern did not intend for plaintiffs to become aware of [Silver Fern's] alleged false representation to the government." (Cleaned up.) Silver Fern thus couldn't have intended for plaintiffs to rely on those falsehoods. For example, the Daughtrys found out about the altered emails only when the government, not Silver Fern, disclosed them in criminal discovery. And, when Jake Daughtry subpoenaed Silver Fern for the emails at issue, Silver Fern omitted the doctored emails, suggesting that Silver Fern didn't want the Daughtrys to discover or rely on the false statements.

At oral argument, the plaintiffs asserted that Silver Fern produced fake documents to the government, knowing that the government would forward them to the plaintiffs during criminal discovery and intending to influence the plaintiffs through that eventual discovery. But "we cannot and will not consider arguments raised for the first time at oral argument." *Jackson v. Gautreaux*, 3 F.4th 182, 188 n.* (5th Cir. 2021).

And though the Daughtrys must allege that they relied on the defendants' lies, *see Wesdem*, 70 F.4th at 291, they have, at best, alleged that the *government* relied on them. The complaint says that "the Government was relying on Silver Fern communications in an attempt to establish" elements of its criminal case; that the government, in developing its case, "look[ed] to Silver Fern's fabricated documents"; that the altered emails "resulted in Plaintiffs being criminally charged" by the government; and that the false statements "created the basis for the Government's attempts at prosecution."

Indeed, in plaintiffs' telling, when they first came across the doctored emails, they immediately recognized that the emails were modified and, thus, didn't rely on the false statements within. The emails "stuck out to Jake Daughtry like a sore thumb because the language used was like nothing he had ever seen before from Silver Fern." Comparing them to "the originals" he had kept, he promptly discovered the alterations.

On appeal, plaintiffs also claim that the Karr Tuttle Memorandum was "actionable fraud." That theory appears

nowhere in the complaint or in plaintiffs' opposition to Silver Fern's motion to dismiss, so we decline to address it. *Edmiston v. La. Small Bus. Dev. Ctr.*, 931 F.3d 403, 406 n.3 (5th Cir. 2019) (declining to consider "arguments . . . not in the complaint" and where plaintiff didn't "raise[ ] [them] before the district court").

Plaintiffs assert in their reply brief, but not in their opening brief, that Silver Fern defrauded them by failing to disclose that it had decided to stop selling BDO, and why it came to that decision. That argument is forfeited. *See Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 208 (5th Cir. 2014).

B.

The court properly dismissed the fraud-conspiracy claim. The plaintiffs didn't adequately allege fraud, and "a civil conspiracy claim is connected to the underlying tort and survives or fails alongside it." *Agar Corp., Inc. v. Electro Cirs. Int'l, L.L.C.*, 580 S.W.3d 136, 141 (Tex. 2019).

C.

The Daughtrys challenge the dismissal of their failure-to-warn products-liability claims against Silver Fern. When Silver Fern sent invoices to Right Price at the time of Right Price's BDO purchases, it failed to attach an SDS warning that the chemical could be used as a date-rape drug. Their theory seems to be that, had Silver Fern attached the correct SDS, they would have conducted themselves differently and, thus, wouldn't have been criminally prosecuted.

Appendix A

A failure-to-warn products-liability claim requires that

> (1) a risk of harm is inherent in the product or may arise from the intended or reasonably anticipated use of the product; (2) the product supplier actually knows or reasonably foresees the risk of harm at the time the product is marketed; (3) the product possesses a marketing defect; (4) the absence of the warning or instructions renders the product unreasonably dangerous to the ultimate user or consumer of the product; and (5) the failure to warn causes the product user's injury.

Olympic Arms, Inc. v. Green, 176 S.W.3d 567, 578 (Tex. App.—Houston [1st Dist.] 2004, no writ).

The district court correctly dismissed the products-liability claim. Regardless of whether the Daughtrys, as non-users of the product, may recover under a failure-to-warn theory, *see Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969) ("[R]ecovery under the strict liability doctrine is not limited to users and consumers."), the Daughtrys do not claim injuries from defects in BDO itself but, instead, assert injuries deriving from criminal prosecutions for unlawfully handling the drug. *Cf. Mid Continent Aircraft Corp. v. Curry Cnty. Spraying Serv., Inc.*, 572 S.W.2d 308, 312–13 (Tex. 1978) ("[d]istinguish[ing] . . . personal injury" from economic losses for strict-liability purposes).

The Daughtrys also press a negligent-undertaking claim under § 323 or 324A of the Restatement (Second) of Torts. But a claim under either section requires "physical harm." *See King v. Graham Holding Co.*, 762 S.W.2d 296, 300 (Tex. App.—Houston [14th Dist.] 1988, no writ). They said that they "were injured" when their businesses "were raided and closed and the individual interests of [the Daughtry family members] were reduced to nothing as the businesses could no longer operate for a period of time." They also claimed that Silver Fern's lies "resulted in an injunction that prevented the Daughtrys from opening their lawful businesses," "eliminating their sources of income and severely limiting their ability to finance their defenses." None of that is "physical harm." *See id.* (no physical harm where plaintiffs alleged financial injuries of $6 million from credit-score decrease). Nor have the Daughtrys pleaded that Silver Fern took on a responsibility not to cause financial harm that would justify imposing malpractice or a similar type of liability. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 418–19 (Tex. 2011).

The district court correctly dismissed the products-liability claims.

* * *

The judgment of dismissal is AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, FILED MAY 16, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. 1:23-CV-343

JAKE ELLIS DAUGHTRY, SANDRA MILLER DAUGHTRY, JAKE'S FIREWORKS, JOSEPH ELLIS DAUGHTRY, RIGHT PRICE CHEMICALS, LLC, BEST BUY INDUSTRIAL SUPPLY, LLC, LAB CHEMICAL SUPPLY, LLC, AND DAUGHTRY INVESTMENTS, LLC,

Plaintiffs,

versus

SILVER FERN CHEMICAL, INC. AND GILDA FRANCO,

Defendants.

Filed May 16, 2024

MEMORANDUM AND ORDER

Pending before the court are Defendant Gilda Franco's ("Franco") Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) (#23) and Defendant Silver Fern Chemical, Inc.'s

("Silver Fern") Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim (#25). Plaintiffs[1] filed responses in opposition to both Franco's (#27) and Silver Fern's (#30) motions. Franco (#32) and Silver Fern (#33) then filed replies. Having considered the motions, the parties' submissions, the pleadings, and the applicable law, the court is of the opinion that both motions should be granted.

I. Background[2]

Plaintiffs' Amended Complaint, while far from a model of clarity, demonstrates that their claims arise from Silver

1. Plaintiffs in this case include Jake Ellis Daughtry ("Jake"), Jake's father, Joseph Ellis Daughtry ("Joseph"), Jake's mother, Sandra Miller Daughtry ("Sandra") (collectively, "the Daughtrys"), Jake's Fireworks, Right Price Chemicals, LLC ("Right Price"), Best Buy Industrial Supply, LLC ("Best Buy"), Lab Chemical Supply, LLC ("Lab Chemical"), and Daughtry Investments, LLC ("Investments") (all collectively referred to as "Plaintiffs").

2. The facts recited in this opinion are taken primarily from Plaintiffs' (*Corrected*) First Amended Complaint ("Amended Complaint") (#21). At this point, the court does not make any factual findings or determinations; rather, the court accepts Plaintiffs' well-pleaded facts as true for the purpose of deciding the current motions. *See, e.g., Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (noting that at the 12(b)(6) stage, the court must construe all facts in favor of the nonmoving party); *Lytle v. Bexar County*, 560 F.3d 404, 409 (5th Cir. 2009) (citing *Scott v. Harris*, 550 U.S. 372, 378 (2007)). The court, however, also takes judicial notice of the docket entries made in *United States v. Daughtry et al.*, 1:20-CR-55 (the criminal case against the Daughtrys and codefendants), *United States v. Daughtry et al.*, 1:20-CV-305 (a civil action in which the United States sought to prevent the Daughtrys from continuing to operate Jake's Fireworks and Right

Fern's and Franco's participation in an extensive criminal investigation, led by the Drug Enforcement Administration ("DEA"), regarding illegal drug distribution and money laundering. During this investigation, the DEA discovered that the Daughtrys, through their businesses Jake's Fireworks and Right Price, were operating as wholesale distributors of 1, 4-butanediol ("BDO") and shipping the substance nationwide, often to unauthorized purchasers. BDO is a chemical that is commonly used as an industrial solvent, floor stripper, and automobile wheel-well cleaner as well as in the manufacture of certain plastics, elastic fibers, and polyurethanes. BDO, however, can be used illicitly, as a substitute for the "date rape drug" gamma-hydroxybutyric acid ("GHB"). BDO and GHB have similar chemical structures, such that when BDO is ingested, it metabolizes into and has the same side effects as GHB, a Schedule I controlled substance. (#21, Ex. 11).

After a lengthy investigation, a grand jury in the Eastern District of Texas returned a 24-count Indictment, naming Jake, Joseph, Sandra, and six codefendants. The Indictment charged the Daughtrys with conspiracy to possess with intent to distribute and distribution of a controlled substance analogue, in violation of 21 U.S.C. §§ 841, 846; conspiracy to possess with intent to distribute

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Price), and *Daughtry, et al. v. Silver Fern Chemical, Inc. et al.*, 1:22-CV-239 (Plaintiffs' previous federal court action, in which they raised nearly the same claims presented in the case at bar) "to establish the fact of such litigation and related filings." *Moore v. City of Dallas*, No. 3:22-CV-0714-M-BT, 2023 WL 2589394, at *1 n.3 (N.D. Tex. Mar. 17, 2023) (citing *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998)).

and distribution of a date rape drug over the internet to an unauthorized purchaser, in violation of 21 U.S.C. §§ 841(g), 846; and maintaining a drug-involved premises, in violation of 21 U.S.C. § 856(a)(1). Jake and Joseph were also charged with multiple counts of money laundering, in violation of 18 U.S.C. § 1957. The Indictment asserted that two individuals died after consuming BDO that was sold by Right Price. After negotiations with the United States Attorney's Office ("Government"), the charges against Sandra were dismissed, and Jake and Joseph chose to plead guilty. Jake pleaded guilty to one count of conspiracy to possess with intent to distribute and distribution of a date rape drug over the internet to an unauthorized purchaser, in violation of 21 U.S.C. §§ 841(g), 846, and Joseph pleaded guilty to one count of money laundering, in violation of 18 U.S.C. § 1957. In addition, the Government sought and obtained a permanent injunction enjoining the Daughtrys from using Jake's Fireworks or Right Price to sell and distribute BDO.[3]

In this lawsuit, Plaintiffs contend that Silver Fern and Franco engaged in various forms of actionable fraud throughout their participation in the criminal investigation. Although Plaintiffs' theories of liability are quite muddled, the crux of Plaintiffs' action rests on the premise that, on one occasion, Silver Fern or Franco provided the Government with false information, and, on a separate occasion, Silver Fern failed to provide Plaintiffs information when it had a duty to do so.

3. Nonetheless, Plaintiffs, in this action (and others), assert that Jake and Joseph are innocent of the crimes to which they pleaded guilty and stand convicted.

Appendix B

The first communication Plaintiffs discuss in their Amended Complaint is an email sent from Franco to Jake on June 6, 2017. In this email, Franco provided Jake with a "payment receipt" from a "past due invoice" and included the receipt as an attachment to the email. The email also informed Jake that Franco would "process [a] new order for shipment ASAP." Based on Plaintiffs' Amended Complaint, the Daughtrys conducted business with Silver Fern from 2017 to late 2019 or early 2020.

In early 2018, during the course of this relationship, the DEA began investigating the Daughtrys, along with Jake's Fireworks and Right Price. After the DEA's investigation began, specifically on November 7, 2019, "the Government began requesting information from Silver Fern," and the two formed a "cooperative relationship." Soon thereafter, on December 4, 2019, a Silver Fern employee sent an email to Right Price stating: "It has come to our attention that although [BDO] is not a controlled substance listed by the DEA, it can be diverted for illicit use," and noting: "We can ship this out ASAP, but before we ship this to you, we need to have you fill out another regulatory form from the DEA."

In their complaint, Plaintiffs next focus on a decision made within Silver Fern that was not communicated to Plaintiffs. After Silver Fern had been in contact with the Government for a time and the investigation into Right Price and the Daughtrys had progressed, Silver Fern decided to cease selling BDO. Silver Fern made this decision on or near June 29, 2020, and, soon thereafter, informed its other customers of the decision,

but deliberately chose not to provide this information to Right Price or the Daughtrys. To support this assertion, Plaintiffs' Amended Complaint includes an email, sent from Silver Fern's president to Franco, with the subject line "RE: right price," stating that Silver Fern's "course of intended action is to advise the customer that we have no available supply due to procurement issues from supplier [sic]," and clarifying: "We are not telling them we're getting out of the business at this point." (#21, Ex. 10).

Plaintiffs' Amended Complaint then shifts its focus to a series of altered emails (Plaintiffs often refer to these emails as "fabricated") that were originally sent to Jake by Franco and later turned over to the Government, albeit in a different condition. On February 26, 2021, a Silver Fern manager asked Franco to provide "all . . . emails exchanged with [her] contact[] at Right Price" so that Silver Fern could provide these emails to the Government. (#21, Ex. 9). Plaintiffs contend that, upon receiving this request, Franco proceeded to alter various emails she had previously sent to Jake—including the June 6, 2017, email mentioned above. Plaintiffs claim that Franco added to these emails a notation in the attachment section, indicating that a "safety data sheet" ("SDS") for BDO had been sent with each email, and, in the body of these emails, a line informing the recipient that an SDS was attached.[4]

4. Later in 2021, after it came to light that these emails had been altered, Silver Fern conducted an internal investigation, which is memorialized in a Memorandum that Plaintiffs included as an exhibit to their Amended Complaint. (#21, Ex. 13). The Memorandum clarifies that Silver Fern's employees "were told that [they] had to send the SDSs with every shipment" and could

(#21, Ex. 3). Plaintiffs discovered that this alteration had occurred only after the Government disclosed Franco's emails to Jake in his criminal case.

At bottom, Plaintiffs appear to contend that Silver Fern and Franco (along with others) "conspired" to "commit fraud on . . . Plaintiffs," which they assert is evidenced by the above communications. Plaintiffs aver that Silver Fern and Franco's conduct formed "the basis for the Government['s] . . . civil and criminal prosecution[s]," "result[ing] in [the Daughtrys] being criminally charged" and having various assets seized. Plaintiffs acknowledge that, at the core of the Government's prosecution for conspiracy to distribute BDO (of which only Jake was convicted) is the requirement that the Government show that a defendant was aware that he was distributing BDO to an unauthorized purchaser and the product was intended for human consumption. *See* 21 U.S.C. §§ 813, 841(g)(1)(A)-(B), and 841(g)(2)(B)(i)-(iii). Plaintiffs assert that Franco's email alterations, combined with Silver Fern's production of these emails to the Government, created the perception that a "voluntary industry standard" was required to "ensure sales were not diverted

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not "rely on the warehouse to send them." *Id.* The Memorandum goes on to note that "Franco explained that she knew that it was company policy for her to provide the SDS, and that she feared she would get audited by her manager for not doing so." *Id.* "[S]o she altered the email, and did not tell anyone about it." *Id.* In their Amended Complaint, however, Plaintiffs dispute this explanation and contend that this was not Franco's true motivation. Moreover, at this stage of the litigation, Franco has not admitted that she altered the emails in question.

from legitimate channels" that, in reality, never existed, and by which the Daughtrys were judged. In Plaintiffs' view, this "standard" was based solely upon the SDS that Silver Fern purportedly sent to Jake as early as 2017 but, in actuality, never provided. Plaintiffs maintain that the Government held Plaintiffs to the "standard" with which Silver Fern appeared to comply—that is, sending an SDS with every receipt or shipment. Plaintiffs continue, citing the above communications, arguing that Silver Fern and Franco committed various acts of fraud against Plaintiffs. In any event, Plaintiffs contend that without Silver Fern's and Franco's acts of "fraud," Plaintiffs would not have been successfully prosecuted or had their assets seized.[5]

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5. While Plaintiffs' fraud claims will be discussed in greater detail below, at this point, it is worth noting a few issues with the theories lodged in Plaintiffs' Amended Complaint. At this stage, the court takes Plaintiffs' well-pleaded facts as true. Nonetheless, where an assertion in the complaint conflicts with filings upon which the complaint itself relies, that fact is worthy of note. *Cf. Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.) ("Where there is a conflict between allegations in a pleading and exhibits thereto, it is well settled that the exhibits control."), *cert. denied*, 311 U.S. 685 (1940); *Hoffman v. L & M Arts*, No. 3:10-CV-0953, 2011 WL 3567419, at *9 (N.D. Tex. Aug. 15, 2011). Plaintiffs' complaint alleges that the linchpin of the false "voluntary industry standard" is the SDS that Silver Fern never actually sent to Plaintiffs. To support this point, Plaintiffs cite "DEA Contract Investigator" Jerry Salameh's ("Salameh") testimony from a September 2, 2022, hearing in the civil action the Government filed against some of the same plaintiffs in this case, *United States v. Daughtry et al.*, 1:20-CV-305. Plaintiffs' complaint states that Salameh testified "that in order for [Right Price] to comply with federal law, it would have needed to 'maintain the same protocols . . . Silver Fern Chemical put on Right Price

In light of these allegations, Plaintiffs assert that Silver Fern and Franco committed common law fraud, fraud by nondisclosure, constructive fraud, negligent misrepresentation, failure to warn, and civil conspiracy. In response, both Defendants filed motions to dismiss. In its motion, Silver Fern contends that this action should be dismissed for lack of subject matter jurisdiction and for failure to state a claim. Franco, in her motion, asserts the same arguments as Silver Fern, but she also maintains that this court lacks personal jurisdiction over her, such that she should be dismissed from the case.

Chemicals as certifying Right Price Chemicals was an authorized buyer and meeting all the parameters of the vetting procedure.'" (1:20-CV-305, #44). Plaintiffs suggest that this comment relates to providing SDSs; however, when read in context, Salameh appears to be referring to "authorized purchaser forms" (a form provided to a purchaser by the seller in which the purchaser confirms that it has some legitimate purpose for buying BDO) and the burden imposed on a supplier to confirm that it is selling to authorized purchasers. Salameh does not discuss SDSs in his testimony. Indeed, Plaintiffs' theory is questionable—no matter how much information regarding BDO (and its relation to GHB) a seller provides to a purchaser, that information will not transform an unauthorized purchaser into an authorized purchaser. In fact, in their complaint, Plaintiffs seemingly confuse an SDS with an authorized purchaser form. For example, Plaintiffs state that "[b]y going back in time to manipulate emails allegedly sent before the regulations changed," Silver Fern and Franco "caused confusion related to the standard of care for *end user forms*." Plaintiffs, however, make no other mention of "end user forms" or, rather, "authorized purchaser forms" in their complaint. Further, Plaintiffs do not explain how receiving the SDS from Silver Fern would have prevented them from selling to unauthorized purchasers.

II. Subject Matter Jurisdiction

A motion to dismiss filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the subject matter jurisdiction of the federal district court. *See* FED. R. CIV. P. 12(b)(1). "Federal courts are courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. ___, 139 S. Ct. 1743, 1746 (2019) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Rasul v. Bush*, 542 U.S. 466, 489 (2004) (quoting *Kokkonen*, 511 U.S. at 377 (citations omitted)). Accordingly, the court "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Gonzalez v. Limon*, 926 F.3d 186, 188 (5th Cir. 2019) (citing *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001)).

A. Standing

The absence of Article III standing "is a defect in subject matter jurisdiction," and therefore provides appropriate grounds for the court to dismiss an action pursuant to Rule 12(b)(1) for want of subject matter jurisdiction. *Goberman v. Cascos*, No. 3:16-CV-0994-G, 2016 WL 3688604, at *2 (N.D. Tex. Jul. 12, 2016) (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986)); *see Va. House of Delegates v. Bethune-Hill*, 587 U.S. ___, 139 S. Ct. 1945, 1950-51 (2019) (recognizing that standing is required for an Article III court to have

jurisdiction); *Cell Sci. Sys. Corp. v. La. Health Serv.*, 804 F. App'x 260, 262-63 (5th Cir. 2020); *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 133 (5th Cir. 2009).

"The standing doctrine defines and limits the role of the judiciary and is a threshold inquiry to adjudication." *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)); *see Va. House of Delegates*, 139 S. Ct. at 1950 (recognizing that standing is required for an Article III court "[t]o reach the merits of a case"); *Singh v. RadioShack Corp.*, 882 F.3d 137, 150-51 (5th Cir. 2018). Standing to sue means that "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *accord Singh*, 882 F.3d at 150-51; *Save Our Cmty. v. U.S. EPA*, 971 F.2d 1155, 1160 (5th Cir. 1992); *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 617-18 (E.D. Tex. 2016).

The standing inquiry involves both constitutional limitations on federal court jurisdiction, rooted in Article III, as well as prudential limitations on its exercise. *See Singh*, 882 F.3d at 151 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014)). "[T]o establish Article III standing, a party must demonstrate a case or controversy." *Serafine v. Crump*, 800 F. App'x 234, 236 (5th Cir. 2020) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982)). To do so, "a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged

behavior; and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *accord TransUnion v. Ramirez*, 594 U.S. 413, 423 (2021) (citing *Lujan*, 504 U.S. at 560-61); *Lefebure v. D'Aquilla*, 15 F.4th 650, 653 (5th Cir. 2021). Importantly, "[a]s the part[ies] invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing." *TransUnion*, 594 U.S. at 430-31 (citing *Lujan*, 504 U.S. at 561); *Va. House of Delegates*, 139 S. Ct. at 1951; *Singh*, 882 F.3d at 150-51; *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

B. Injury in Fact

Defendants first contend that three Plaintiffs—Best Buy, Lab Chemical, and Investments—lack standing because they have failed to allege that they suffered any injury at all. On this point, Defendants are correct. An "injury in fact" means "an invasion of a legally protected interest which is" both "concrete and particularized . . . and . . . actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). The injury "must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. Plaintiffs' Amended Complaint does not allege that these entities suffered any injury or are sufficiently connected to the harms that are alleged in the Amended Complaint.

Nonetheless, at this early stage, "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. F. for Acad. &*

Institutional Rts., Inc., 547 U.S. 47, 53 n.2 (2006); *see Dep't of Com. v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2565 (2019). Accordingly, although each plaintiff must ultimately demonstrate standing to obtain relief, the court may proceed to the merits if at least one plaintiff has standing to pursue each claim asserted. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017); *Braidwood Mgmt. Inc. v. Becerra*, 627 F. Supp. 3d 624, 638 (N.D. Tex. 2022). To that end, the Amended Complaint alleges that Jake, Joseph, Sandra, Right Price, and Jake's Fireworks suffered some injury.[6] The complaint clarifies that Jake, Joseph, and Sandra were all indicted and initially prosecuted, although the charges against Sandra were later dismissed. As to Right Price and Jake's Fireworks, the complaint alleges that the July 15, 2020, search and seizure involved property attributable to both businesses.

C. Traceability

Defendants next contend, however, that, even setting aside their assertion that Best Buy, Lab Chemical, and Investments failed to allege any injury, none of the Plaintiffs can establish standing in this action due to temporal constraints.[7] They argue that the harm about

6. Silver Fern also contends that the complaint fails to allege that Sandra suffered any injury sufficient to satisfy Article III; however, for the reasons that follow, the allegations in the complaint demonstrate otherwise.

7. Defendants appear to concede that Jake, Joseph, Right Price, and Jake's Fireworks suffered an injury in fact for purposes of Article III standing.

which Plaintiffs complain is not traceable to Defendants' fraud because the claimed fraudulent conduct occurred after Plaintiffs were injured. The traceability component of Article III standing requires "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Specifically, Defendants assert that, because the conduct about which Plaintiffs complain occurred in or around February 2021 (according to Silver Fern's internal Memorandum (#21, Ex. 13)), the conduct is not traceable to Plaintiffs' alleged harm—that harm ostensibly being the June 3, 2020, Indictment and the July 15, 2020, raid and property seizure.

The traceability issue, however, is more complex than Defendants allege. Although not entirely clear, two key points from Plaintiffs' complaint are apparent. First, Plaintiffs dispute the time frame established in the Silver Fern Memorandum. Plaintiffs clarify in their response to Silver Fern's motion to dismiss that, in their view, the email alterations must have occurred prior to the Daughtrys being indicted. Although nebulous, this view is indeed confirmed by allegations made in Plaintiffs' complaint. (#21, p. 8, 10, 12, 13, 15). Second, Plaintiffs contend that Defendants engaged in fraudulent conduct other than email alteration. Plaintiffs assert, for instance, that Silver Fern committed fraud by failing to disclose to Plaintiffs in June 2020 that it was no longer selling BDO. Further, Plaintiffs allege that they were also harmed by the civil proceeding through which they were enjoined from continuing to sell BDO, an event that clearly occurred after Franco's alleged email alteration—even according to the dates set forth in Silver Fern's internal Memorandum.

Thus, a close reading of Plaintiffs' complaint demonstrates that there are multiple injuries about which Plaintiffs complain that are traceable to the alleged fraudulent acts Plaintiffs contend Defendants committed. Accordingly, Plaintiffs have satisfied their burden of demonstrating Article III standing such that the court may address the merits of Plaintiffs' claims.[8]

III. Personal Jurisdiction

A motion to dismiss filed under Rule 12(b)(2) of the Federal Rules of Civil Procedure challenges the court's personal jurisdiction. *See* FED. R. CIV. P. 12(b)(2). Thus, before reaching the merits, the court must address Franco's challenge to the court's exercise of personal jurisdiction over her. Franco, a citizen of Arizona, contends that this court does not have personal jurisdiction, either general or specific, over her, and, thus, she must be dismissed from the action.

When a nonresident defendant files a motion to dismiss for lack of personal jurisdiction, the party seeking to invoke federal court jurisdiction over the nonresident defendant has the burden of showing that the exercise of personal jurisdiction is proper. *Sangha v. Navig8 ShipManagement Priv. Ltd.*, 882 F.3d 96, 101 (5th Cir. 2018); *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 211 (5th Cir. 2016); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429,

8. While Defendants make passing references to redressability, they do not specifically challenge Plaintiffs' standing on that basis.

431 (5th Cir. 2014). When a "court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, that burden requires only that the nonmovant make a *prima facie* showing." *Danziger & De Llano, L.L.P. v. Morgan Verkamp, L.L.C.*, 24 F.4th 491, 495 (5th Cir. 2022) (quoting *Herman v. Cataphora, Inc.*, 730 F.3d 460, 464 (5th Cir. 2013)). Moreover, at the 12(b)(2) stage, where no evidentiary hearing is held, the court accepts all Plaintiffs' uncontroverted allegations as true, so long as the allegations are not merely conclusory, and resolves all factual conflicts in Plaintiffs' favor. *Ritter*, 768 F.3d at 431; *E. Concrete Materials, Inc. v. ACE Am. Ins. Co.*, 948 F.3d 289, 295 (5th Cir. 2020); *Diagnostic Affiliates of Ne. Hou, LLC v. Aetna, Inc.*, 654 F. Supp. 3d 595, 603 (S.D. Tex. 2023).

"A nonresident defendant is subject to personal jurisdiction in a federal diversity suit to the extent permitted by the laws of the forum state and considerations of constitutional due process." *Danziger & De Llano, L.L.P.*, 24 F.4th at 495 (quoting *Command-Aire Corp. v. Ontario Mech. Sales & Serv. Inc.*, 963 F.2d 90, 93 (5th Cir. 1992)); *see Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 261-62 (2017). "Because the Texas long-arm statute extends to the limits of federal due process, the two-step inquiry collapses into one federal due process analysis." *Danziger & De Llano, L.L.P.*, 24 F.4th at 495 (quoting *Sangha*, 882 F.3d at 101). In that regard, federal due process "requires that the defendant have 'minimum contacts' with the forum state . . . and that exercising jurisdiction is consistent with 'traditional notions of fair play and substantial justice.'" *Sangha*, 882 F.3d at 101 (quoting *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d

602, 609 (5th Cir. 2008)); *see Danziger & De Llano, L.L.P.*, 24 F.4th at 495. "'Minimum contacts' can give rise to either specific jurisdiction or general jurisdiction." *Sangha*, 882 F.3d at 101 (quoting *Lewis v. Fresne*, 252 F.3d 352, 358 (5th Cir. 2001)); *Ritter*, 768 F.3d at 431 (quoting *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002)); *see Bristol-Myers Squibb Co.*, 582 U.S. at 262.

A. General Jurisdiction

General jurisdiction is "difficult" to establish "and requires 'extensive contacts between a defendant and a forum.'" *Sangha*, 882 F.3d at 101-02 (quoting *Johnston*, 523 F.3d at 609). Specifically, "general jurisdiction" applies when the defendant's contacts with the state, although they have no necessary relationship to the causes of action, "are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State." *Id.* at 101 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *see Ritter*, 768 F.3d at 432. "Even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required. . . . [V]ague and overgeneralized assertions that give no indication as to the extent, duration, or frequency of contacts are insufficient to support general jurisdiction." *Sangha*, 882 F.3d at 102 (quoting *Johnston*, 523 F.3d at 609). Furthermore, "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." *Bristol-Myers Squibb Co.*, 582 U.S. at 262 (quoting *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919).

Here, Franco is clearly not "at home" in Texas. Franco is a citizen of Arizona, and the accumulation of Franco's contacts with Texas, as alleged in the complaint, fall far short of "continuous and systematic." *See Sangha*, 882 F.3d at 101; *Cunningham v. Upwell Health, LLC*, No. 4:19-CV-894, 2020 WL 4723175, at *4 (E.D. Tex. July 21, 2020), *adopted by* No. 4:19-CV-894, 2020 WL 4698322 (E.D. Tex. Aug. 13, 2020). According to Plaintiffs' Amended Complaint, Franco's contacts with Texas took two forms: first, Franco's sending various emails to Jake, who was in Texas at the time, regarding BDO purchases from Silver Fern; and second, her providing altered emails to the Government in Texas directly or by way of her employer, Silver Fern. These allegations are wholly insufficient to establish general jurisdiction. *See Cunningham*, 2020 WL 4723175, at *4; *Clement Grp., LLC v. ETD Servs., LLC*, No. 4:16-CV-00773, 2017 WL 2972877, at *3 (E.D. Tex. July 12, 2017).

B. Specific Jurisdiction

The question then becomes whether these same contacts are sufficient to give rise to specific jurisdiction over Franco. "Specific jurisdiction may exist 'over a nonresident defendant whose contacts with the forum state are *singular* or sporadic only if the cause of action asserted arises out of or is related to those contacts.'" *Sangha*, 882 F.3d at 101 (quoting *Int'l Energy Ventures Mgmt., L.L.C.*, 818 F.3d at 212); *see Bristol-Myers Squibb Co.*, 582 U.S. at 262; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). Further, the nonresident defendant must have "purposely directed its activities toward the

forum state or purposefully availed itself of the privileges of conducting activities there." *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006); *see Sangha*, 882 F.3d at 101 (quoting *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 243 (5th Cir. 2008)); *see also Burger King Corp.*, 471 U.S. at 475. These contacts, however, "must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)).

Accordingly, those defendants who "'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp.*, 471 U.S. at 473 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). Nonetheless, as noted above, the exercise of personal jurisdiction must also be "fair and reasonable."[9] *Sangha*, 882 F.3d at 102.

When arguing that this court has specific jurisdiction over Franco, Plaintiffs point to the same two contacts discussed above. On this note, Franco contends that, contrary to Plaintiffs' assertions, neither her emails to Jake nor her provision of the altered emails to the Government constitute minimum contacts for the purpose

9. Only after a plaintiff "establishes minimum contacts between the defendant and the forum state" does "the burden of proof shift[ ] to the defendant to show that the assertion of jurisdiction is unfair and unreasonable." *Sangha*, 882 F.3d at 102.

of specific personal jurisdiction. Further, with regard to the emails she sent to Jake, Franco contends that the "fiduciary shield" doctrine applies to her conduct, meaning that, because she was acting on behalf of her employer Silver Fern, these contacts cannot be used to maintain jurisdiction over her. In addition, as to her provision of the altered emails, Franco argues that this contact does not "constitute purposeful availment . . . of the privileges of conducting activities in Texas."

1. Email Correspondence

The "fiduciary shield" doctrine provides that, ordinarily "an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction over that individual though the state has in personam jurisdiction over the corporation." *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985); *Cypers v. PHI-BCC, LLC*, No. 4:21-CV-00382, 2022 WL 79837, at *4 (E.D. Tex. Jan. 7, 2022). Indeed, "jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation." *Stuart*, 772 F.2d at 1197 n.11; *see Smith v. Antler Insanity, LLC*, 58 F. Supp. 3d 716, 721 (S.D. Miss. 2014) ("[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." (quoting *Keeton*, 465 U.S. at 781 n.13)). Doubtless, however, the doctrine is not without limitation. The doctrine provides no protection where, for example, "individual officers, as agents of the corporation[,] would be personally liable to any third person they injured by virtue of their tortious activity even if such acts were performed within the scope of their

employment as corporate officers." *Stuart*, 772 F.2d at 1197; *Tex. Pellets, Inc. v. German Pellets GmbH*, No. 2:18-CV-178, 2019 WL 4557437, at *2 (E.D. Tex. Aug. 28, 2019), *adopted by sub nom. Tex. Pellets, Inc. v. Off. Unsecured Creditors Comm. of Tex. Pellets, Inc.*, No. 2:18-CV-178, 2019 WL 4538269 (E.D. Tex. Sept. 19, 2019); *see Hewlett-Packard Co. v. Byd:Sign, Inc.*, No. 6:05-CV-456, 2006 WL 2822151, at *6 (E.D. Tex. Sept. 28, 2006); *see also DLR, LLC v. Montoya*, 465 F. Supp. 3d 676, 683 (N.D. Tex. 2020). With respect to this limitation, a defendant's "personal contacts with Texas while doing business" for her employer "may support specific jurisdiction over [the defendant] only if those contacts are part of an intentional tort or fraudulent act that gives rise to or relates to the instant causes of action." *Hewlett-Packard Co.*, 2006 WL 2822151, at *6; *see D.J. Invs., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 548 (5th Cir. 1985); *DLR, LLC*, 465 F. Supp. 3d at 682 n.20.

Plaintiffs agree that Franco's initial emails to Jake were sent in association with BDO shipments made to Texas. In response, Franco notes that any contact with Texas involving email correspondence was "strictly in [her] capacity as an employee or agent for her employer, Silver Fern," and asserts that she "is shielded from personal jurisdiction under the 'fiduciary-shield doctrine.'" On this point, Franco is correct—her email contacts with Texas appear to relate only to her employment with Silver Fern. In fact, Plaintiffs do not contend that Franco was engaging in "fraud" at the time she initially emailed Jake regarding BDO purchases and invoices, which occurred in the years prior to the raid and the Daughtrys'

prosecution.[10] Accordingly, while the "fiduciary shield" doctrine does not provide protection to an individual for her tortious activity (even when performed within the scope of her employment), Plaintiffs' Amended Complaint does not allege that Franco was engaging in fraudulent conduct when she first sent these emails. It is only later, when Plaintiffs state that Franco altered the emails and provided them to the Government, that Plaintiffs contend the fraudulent conduct occurred. That said, the email contacts to which Plaintiffs refer are not "part of an intentional tort or fraudulent act that gives rise to or relates to the instant causes of action" such that the "fiduciary shield" doctrine applies to these contacts.[11] *See Hewlett-Packard Co.*, 2006 WL 2822151, at *6. As a result, these initial email contacts do not support a *prima facie* showing of personal jurisdiction over Franco.

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10. Although this point will be discussed further below, it is notable that, to the extent Plaintiffs wish to assert a fraud claim based on these initial emails, they have failed to state a plausible claim.

11. Importantly, for this same reason, even without the aid of the "fiduciary shield" doctrine, Plaintiffs are unable to support their claim of personal jurisdiction with these early email communications. According to the Amended Complaint, Plaintiffs' claims do not "arise" from these emails, which were sent after each of their BDO purchases but before the time that Plaintiffs contend the "fraud" occurred. *DLR, LLC*, 465 F. Supp. 3d at 682-84; *see Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992).

2. Providing Altered Emails to the Government

Plaintiffs next assert that Franco's provision of altered emails "to the Government" while "knowing that they would be used" in the Daughtrys' "prosecution in the Eastern District of Texas" constitute minimum contacts for the purpose of personal jurisdiction. On this point, Plaintiffs clarify that Franco or Silver Fern provided the altered "emails to the Government in response to a subpoena" at some point after Franco altered them. Franco, on the other hand, contends that these actions do not constitute "purposeful availment . . . of the 'privileges of conducting activities' in Texas."

With respect to this contact, assuming that Franco is no longer behind the "fiduciary shield,"[12] Plaintiffs are nonetheless unable to demonstrate that Franco's provision of altered emails satisfies "minimum contacts" with Texas for the purpose of establishing specific jurisdiction. Contacts constituting "purposeful availment" "must arise out of contacts that the 'defendant [herself]' creates with the forum State," *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quoting *Burger King Corp.*, 471 U.S. at 475), and also "must be the defendant's own choice." *Ford Motor Co.*, 592 U.S. at 359. Here, Franco did not create a meaningful contact with Texas when providing

12. It appears that Franco is no longer protected by the "fiduciary shield" doctrine (nor does she contend otherwise) because Plaintiffs assert that Franco's email alteration and release of the emails to the Government were all part of the fraudulent scheme alleged. *See Stuart*, 772 F.2d at 1197.

emails to the Government in response to a subpoena. *See Lauck v. County of Campbell*, No. CV-21-08036, 2021 WL 2780868, at *4 (D. Ariz. July 2, 2021) ("Defendants did not themselves create a meaningful contact with Arizona when responding to the Subpoena."). A subpoena is "a legal document requiring [an individual's] response," and, moreover, "[c]ourts have found that responding to a subpoena is not a voluntary act." *Lauck*, 2021 WL 2780868, at *4. Although Franco sent documents to "forum state individuals," that action was "initiated by the subpoena."[13] *Id.* Thus, Franco's provision of the altered emails to the Government in response to a subpoena was not her "own choice," and, as such, she did not create the contact with Texas herself. *See Ford Motor Co.*, 592 U.S. at 359; *Walden*, 571 U.S. at 284; *Lauck*, 2021 WL 2780868, at *4. Plaintiffs do not rely on any other communication or conduct on Franco's part to support their claim of personal jurisdiction. Thus, Franco's providing the altered emails to the Government does not support a *prima facie* showing of personal jurisdiction. Therefore, the court must dismiss

13. It is not entirely clear from the complaint whether Franco or Silver Fern sent the altered emails to the Government. To be sure, the emails were sent in response to a subpoena; that is plainly stated in the complaint. Parts of the complaint seem to suggest that the subpoena was sent to Silver Fern, and, if that were the case, Silver Fern would most likely have requested that Franco provide the emails to Silver Fern that she had previously sent to Jake for the company to forward to the Government. If that were so, it would appear that Franco was not in direct contact with the Government at all. In other words, her contact with Texas would have been by way of Silver Fern. Nonetheless, because Plaintiffs repeatedly contend that Franco sent the emails to the Government, the court addresses this argument in that context.

Franco as a defendant in this action for lack of personal jurisdiction.

IV. Failure to State a Claim

A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests only the formal sufficiency of the statement of a claim for relief and is "appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face"); *Spano ex rel. C.S. v. Whole Foods, Inc.*, 65 F.4th 260, 262 (5th Cir. 2023) (quoting *Innova Hosp. San Antonio, Ltd. P'ship v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018)). Such a motion is "not meant to resolve disputed facts or test the merits of a lawsuit" and "instead must show that, even in the plaintiff's best-case scenario, the complaint does not state a plausible case for relief." *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 581 (5th Cir. 2020); *Oyekwe v. Rsch. Now Grp., Inc.*, 542 F. Supp. 3d 496, 502 (N.D. Tex. 2021); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (3d ed. 2019). In ruling on such a motion, the court must accept the factual allegations of the complaint as true, view them in a light most favorable to the plaintiff, and draw all reasonable inferences in favor of the plaintiff.

Hernandez v. Mesa, 582 U.S. 548, 550 (2017); *Ramirez v. Guadarrama*, 3 F.4th 129, 133 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2571 (2022); *IberiaBank Corp.*, 953 F.3d at 345 (citing *Leal*, 731 F.3d at 410). The court, however, does not "strain to find inferences favorable to the plaintiffs" or "accept conclusory allegations, unwarranted deductions, or legal conclusions." *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004); *accord Ruvalcaba v. Angleton Indep. Sch. Dist.*, No. 20-40491, 2022 WL 340592, at *3 (5th Cir. Feb. 4, 2022).

"[T]he plaintiff's complaint [must] be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged." *Oscar Renda Contracting, Inc. v. Lubbock*, 463 F.3d 378, 381 (5th Cir. 2006) (citing *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989)), *cert. denied*, 549 U.S. 1339 (2007); *Ramming*, 281 F.3d at 161; *Pathology Lab'y Inc. v. Mt. Hawley Ins. Co.*, 552 F. Supp. 3d 617, 621 (W.D. La. 2021). The "[f]actual allegations must be enough to raise a right to relief above the speculative level."[14] *Bell Atl. Corp. v.*

14. Generally, the court may not look beyond the four corners of the plaintiff's pleadings. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 261 (5th Cir. 1999); *see King*, 46 F.4th at 356. The court may, however, consider "documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010); *see Innova Hosp. San Antonio, L.P.*, 892 F.3d at 726 ("[A] court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" (quoting *Wolcott v. Sebelius*, 635 F.3d

Twombly, 550 U.S. 544, 555 (2007); *accord Spano ex rel. C.S.*, 65 F.4th at 262; *King v. Baylor Univ.*, 46 F.4th 344, 355 (5th Cir. 2022). A Rule 12(b)(6) motion to dismiss must be read in conjunction with Rule 8(a) of the Federal Rules of Civil Procedure. *Twombly*, 550 U.S. at 555. Further, "a complaint's allegations 'must make relief plausible, not merely conceivable, when taken as true.'" *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 734 (5th Cir. 2019) (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009)); *see King*, 46 F.4th at 355; *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 263 (5th Cir. 2019) ("Though the complaint need not contain 'detailed factual allegations,' it must contain sufficient factual material to 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" (quoting *Iqbal*, 556 U.S. at 678)).[15]

757, 763 (5th Cir. 2011))). A court may also review documents "attached to a response to a motion to dismiss when [they are] sufficiently referenced in the complaint and [their] authenticity is unquestioned." *Am. Gen. Life Ins. Co. v. Mickelson*, No. H-11-3421, 2012 WL 1355591, at *2 (S.D. Tex. Apr. 18, 2012) (citing *Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 293-94 (5th Cir. 2008)).

15. A factual assertion or theory of liability not set forth in the complaint is not properly before the court on a motion to dismiss. *See Law v. Ocwen Loan Servicing, L.L.C.*, 587 F. App'x 790, 793 n.2 (5th Cir. 2014) ("Review of a Rule 12(b)(6) dismissal is, by its very nature, limited to the allegations and theories set forth in the complaint that the district court had before it when granting the motion to dismiss."); *Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co.*, No. 3:20-CV-1348-D, 2020 WL 5946863, at *1 n.3 (N.D. Tex. Oct. 7, 2020) ("This court has repeatedly held that, when ruling on a motion to dismiss, the court does not consider

Appendix B

A. Fraud Claims

In order to succeed on their fraud claims, Plaintiffs' pleadings must also satisfy the federal pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. *See Pace v. Cirrus Design Corp.*, 93 F.4th 879, 889 (5th Cir. 2024); *Port of Corpus Christi Auth. v. Sherwin Alumina Co., L.L.C. (In re Sherwin Alumina Co., L.L.C.)*, 952 F.3d 229, 235 (5th Cir.), *cert. denied*, 141 S. Ct. 360 (2020). Rule 9(b) provides that in order to state a claim for fraud in federal court, the plaintiff must state with particularity the circumstances constituting the fraud. *See* FED. R. CIV. P. 9(b); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 (2007); *Pace*, 93 F.4th at 889-90; *Stringer v. Remington Arms Co., L.L.C.*, 52 F.4th 660, 661 (5th Cir. 2022). Specifically, Rule 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). Therefore, Rule 9(b) imposes a heightened standard of pleading for averments of fraud. *See* FED. R. CIV. P. 8(a), 9(b); *Pace*, 93 F.4th at 889; *In re Sherwin Alumina Co., L.L.C.*, 952 F.3d at 235. A party must plead, at the minimum, the "who, what, when, where, and how

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additional facts that are alleged in a response brief but not in the complaint." (collecting cases)); *Mohamed v. Irving Indep. Sch. Dist.*, 252 F. Supp. 3d 602, 620 n.10 (N.D. Tex. 2017) (rejecting plaintiff 's attempt to introduce a theory of liability for the first time in response to defendant's motion to dismiss); *Elton Porter Marine Ins. Agency v. Markel Am. Ins. Co.*, No. H-11-4432, 2012 WL 2050254, at *2 (S.D. Tex. June 6, 2012) ("[I]t is insufficient to allege further facts in the response to the motion to dismiss; the factual matter must be contained in the pleadings themselves.").

of the alleged fraud." *In re Sherwin Alumina Co., L.L.C.*, 952 F.3d at 235.

Although not clearly articulated, the court must address each fraud claim Plaintiffs appear to allege.[16] The statements or instances of nondisclosure that Plaintiffs contend are actionable consist of Silver Fern's withholding from Plaintiffs that it had ceased selling BDO and Silver Fern's provision of altered emails to the Government.[17]

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16. In a related vein, Plaintiffs, throughout their filings, contend that the Government, by way of the altered emails, created a "fictitious standard" that the Government then "used against . . . Plaintiffs to take their property, close their business, cause them irreparable harm, and leave them the victims of an unjust criminal prosecution." Plaintiffs, however, never articulate how this assertion establishes a claim for fraud against Silver Fern or Franco. As discussed below, Plaintiffs do not contend that any communication regarding this "fictitious standard" was made to Plaintiffs. Indeed, under this theory, it was the Government that "relied" on Defendants' statements. More importantly, however, this is not the appropriate forum in which to litigate the merits of the Daughtrys' criminal prosecution or to assert their claims of innocence. The Daughtrys have made their views regarding the lawfulness of their criminal prosecution known, *see, e.g., Daughtry v. Englade*, No. 1:22-CV-240, 2023 WL 7386702, at *13 (E.D. Tex. Oct. 17, 2023), and those issues are not ripe for reconsideration in this action.

17. Plaintiffs also allege, in their response to Silver Fern's motion to dismiss, that Silver Fern made "false statements" to Plaintiffs. Ostensibly, this involved telling Plaintiffs that Silver Fern was having supply chain issues rather than exiting the BDO market. There is, however, no assertion in Plaintiffs' complaint that these statements were actually made, although such statements are intimated in their exhibits. (#21, Ex. 9, 10). Furthermore,

Plaintiffs assert that these actions support their claims for fraud, fraud by nondisclosure, constructive fraud, and negligent misrepresentation. Defendants retort, however, that Plaintiffs have failed to plead any plausible claims for relief, much less satisfy the more stringent demands of Rule 9(b).

1. Actual Fraud

In Texas, common law fraud may consist of an affirmative misrepresentation or, in certain circumstances, the concealment or nondisclosure of a material fact. To recover for actual fraud through an affirmative misrepresentation, the plaintiff must establish that:

> (1) the defendant made a material misrepresentation; (2) the defendant knew at the time that the representation was false or lacked knowledge of its truth; (3) the defendant intended that the plaintiff should rely or act on the misrepresentation; (4) the plaintiff relied on the misrepresentation; and (5) the plaintiff's reliance on the misrepresentation caused injury.

Plaintiffs have shifted back and forth regarding which defendant provided the altered emails to the Government. When arguing that this court has personal jurisdiction over Franco, Plaintiffs repeatedly contended that it was Franco who provided the altered emails to the Government pursuant to the subpoena. At other points, Plaintiffs aver that it was Silver Fern who produced them. In any event, for purposes of a Rule 12(b)(6) analysis, the court will analyze Plaintiffs' claims with the view that Silver Fern provided the altered emails to the Government—although, no matter which defendant handed them over, Plaintiffs are unable to state any plausible claims based on these assertions.

Wesdem, L.L.C. v. Ill. Tool Works, Inc., 70 F.4th 285, 291 (5th Cir. 2023); *CBE Grp., Inc. v. Lexington L. Firm*, 993 F.3d 346, 350 (5th Cir. 2021) (quoting *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018)); *D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 218 (5th Cir. 2018).

Although Plaintiffs do not specifically identify which allegedly fraudulent statement is associated with this claim, taking all facts in the light most favorable to Plaintiffs, the court must nonetheless determine whether Plaintiffs have stated any plausible basis for relief. Silver Fern contends, with respect to Plaintiffs' claim that it provided the Government with altered emails, that Plaintiffs cannot plausibly state a claim for actual fraud because Plaintiffs have not alleged that Silver Fern made any representation to Plaintiffs, intended for Plaintiffs to rely on any representation, or that Plaintiffs did rely on any representation. Silver Fern is correct. Plaintiffs have not stated a plausible claim for relief based on the provision of altered emails to the Government. Indeed, under Plaintiffs' theory, the misrepresentation was made to the Government rather than Plaintiffs. Further, Plaintiffs do not contend that they relied or that Silver Fern intended for Plaintiffs to rely on the altered emails because, according to their complaint, it was the Government that relied on these emails to create the "false" and "fictitious" standard with which it prosecuted the Daughtrys. *See JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 653 ("[T]he plaintiff must show that it actually relied on the defendant's representation and, also, that such reliance was justifiable."); *see also Houle v. Casillas*,

594 S.W.3d 524, 564 (Tex. App.-El Paso 2019, no pet.) ("A claim for actual fraud therefore involves dishonesty of purpose or intent to deceive."). In this regard, Silver Fern accurately notes that "Plaintiffs' theory of fraud seems to be that [Silver Fern] did not intend for Plaintiff[s] to become aware of [its] alleged false representation to the government."

Nevertheless, Plaintiffs correctly point out that a fraud claim may be based on a defendant's misrepresentation to another. Specifically, however, for a fraud cause of action to exist, the false representation must "be made with a view of reaching the third person to whom it is repeated, and for the purpose of influencing him." *Harrison v. Meritz Fire & Marine Ins. Co., Ltd.*, No. 14-18-00336-CV, 2020 WL 2070660, at *7 (Tex. App.-Houston [14th Dist.] Apr. 30, 2020, pet. denied) (quoting *Gainesville Nat'l Bank v. Bamberger*, 13 S.W. 959, 961 (1890)); *see Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2001). In other words, "[w]here a party makes a false representation to another with the intent that it should be repeated to a third party the third party can maintain an action in tort against the party making the false statement for the damages resulting from the fraud." *Harrison*, 2020 WL 2070660, at *7 (citing *Am. Indem. Co. v. Ernst & Ernst*, 106 S.W.2d 763, 765 (Tex. Civ. App.-Waco 1937, writ ref'd)). Plaintiffs have not alleged that any representation Silver Fern made to the Government was intended to reach and influence the Daughtrys or that the representation was communicated to the Daughtrys such that they relied on it to their detriment.

In addition, although Silver Fern does not address this point, Plaintiffs contend that, after Silver Fern decided to stop selling BDO without informing Plaintiffs of this fact, Silver Fern then made misrepresentations to Plaintiffs on this basis. That is, Silver Fern told Plaintiffs that it was having supply chain issues when, in fact, it was out of the BDO business. The problem with this theory, however, is that Plaintiffs have not alleged with specificity that these communications took place. To be sure, Plaintiffs provide ample support for their assertion that Silver Fern decided not to tell Plaintiffs that it would no longer sell BDO (#21, Ex. 10, 12), but they have not provided any support for their claim that Silver Fern affirmatively represented to Plaintiffs that it was having supply chain issues rather than telling them that it was ceasing BDO sales. Thus, Plaintiffs have failed to identify sufficiently the "when," "where," and "how" of these allegedly fraudulent misrepresentations as required by Rule 9(b).[18]

2. Fraud by Nondisclosure

Fraud by nondisclosure, a subtype of fraud, "occurs when a party has a duty to disclose certain information

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18. Although Plaintiffs do not appear to contend that Franco's original emails to Plaintiffs constitute fraud, were they to make such an assertion, it would fail for many of the same reasons discussed above. Chief among them, however, is the fact that Plaintiffs do not allege that Franco or anyone at Silver Fern had any intent to defraud Plaintiffs at this early stage. Indeed, Plaintiffs do not contend that the "cooperative relationship" between Silver Fern and the Government materialized until years after the initial 2017 email.

and fails to disclose it." *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 219 (Tex. 2019) (citing *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997)). Fraud by nondisclosure requires a plaintiff to show:

> (1) the defendant deliberately failed to disclose material facts; (2) the defendant had a duty to disclose such facts to the plaintiff; (3) the plaintiff was ignorant of the facts and did not have an equal opportunity to discover them; (4) the defendant intended the plaintiff to act or refrain from acting based on the nondisclosure; and (5) the plaintiff relied on the non-disclosure, which resulted in injury.

Bombardier Aerospace Corp., 572 S.W.3d at 219-20; *Baxsto, LLC v. Roxo Energy Co., LLC*, 668 S.W.3d 912, 928 (Tex. App.-Eastland 2023, pet. filed); *Blankinship v. Brown*, 399 S.W.3d 303, 308 (Tex. App.-Dallas 2013, pet. denied); *see Bradford v. Vento*, 48 S.W.3d 749, 754-55 (Tex. 2001). There is generally "no duty to disclose without evidence of a confidential or fiduciary relationship." *Bombardier Aerospace Corp.*, 572 S.W.3d at 220 (citing *Ins. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998)). There may, however, "also be a duty to disclose when the defendant: (1) discovered new information that made its earlier representation untrue or misleading; (2) made a partial disclosure that created a false impression; or (3) voluntarily disclosed some information, creating a duty to disclose the whole truth." *Id.*; *Baxsto, LLC*, 668 S.W.3d at 933; *see Alcan Aluminum Corp. v. BASF Corp.*, 133 F. Supp. 2d 482, 498-99 (N.D. Tex. 2001).

According to the complaint, Plaintiffs rely on only two avenues to assert a fraud claim based on nondisclosure. First, they contend that Silver Fern had a duty to disclose that it was exiting the BDO business. Second, their complaint intimates a nondisclosure theory based on Silver Fern's failure to provide Plaintiffs with the SDS for which Franco later altered emails to make it appear as if it were included. Silver Fern asserts that Plaintiffs are unable to state a claim on either of these grounds because Silver Fern owed no duty to disclose this information to Plaintiffs and, further, because Plaintiffs have not alleged "how either omission was intended to or did induce Plaintiffs' reliance."

At the outset, Plaintiffs have failed to demonstrate that Silver Fern had a duty to disclose this information to Plaintiffs. For one, Plaintiffs have failed to allege the existence of a fiduciary relationship between Plaintiffs and Silver Fern. A fiduciary relationship may "take two forms: '(1) a formal fiduciary relationship arising as a matter of law, such as between partners or an attorney and a client, and (2) an informal or confidential fiduciary relationship arising from a moral, social, domestic, or merely personal relationship where one person trusts in and relies on another.'" *In re Est. of Grogan*, 595 S.W.3d 807, 817 (Tex. App.-Texarkana 2020, no pet.) (quoting *Gray v. Sangrey*, 428 S.W.3d 311, 316 (Tex. App.-Texarkana 2014, pet. denied)). Plaintiffs do not allege that any formal fiduciary relationship exists in this case; rather, they seem to contend that an informal fiduciary relationship developed between them and Silver Fern. Courts, however, "remain cautious to create informal fiduciary

relationships in business arrangements." *Gregan v. Kelly*, 355 S.W.3d 223, 228 (Tex. App.-Houston [1st Dist.] 2011, no pet.). When determining whether an informal fiduciary relationship exists, courts are primarily concerned with "the nature of the relationship between the parties." *Id.* (citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962)). "The mere existence of mutual confidence and trust in the other party in a transaction does not, in itself, . . . create an informal fiduciary relationship." *Id.* (citing *Schlumberger Tech. Corp.*, 959 S.W.2d at 177). In that vein, "[a]n informal fiduciary relationship requires proof that, because of a close or special relationship, the plaintiff 'is in fact accustomed to be guided by the judgment or advice' of the other." *Id.* (quoting *Thigpen*, 363 S.W.2d at 253); *see Ritchie v. Rupe*, No. 05-08-00615-CV, 2016 WL 145581, at *4 (Tex. App.-Dallas Jan. 12, 2016, pet. denied). Further, where business transactions are involved, informal fiduciary duties are not owed "unless the special relationship of trust and confidence existed prior to, and apart from, the transaction(s) at issue in the case." *Ritchie*, 2016 WL 145581, at *4 (citing *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005)).

Plaintiffs have not pleaded any facts to support the existence of an informal fiduciary relationship between them and Silver Fern. Plaintiffs did not respond to Silver Fern's arguments on this point in their reply brief. Moreover, even if Plaintiffs contend that they "trusted and relied on" the information Silver Fern provided to them throughout the course of their buyer-seller relationship, this would not "transform" their "arm's-length dealing into a fiduciary relationship." *Schlumberger Tech. Corp.*, 959 S.W.2d at 177.

Appendix B

Regarding a duty to disclose arising either from failing to disclose the whole truth, failing to disclose new information that makes earlier statements misleading, or disclosing information that crates a false impression, Plaintiffs have failed to advance a plausible claim that such a duty arose in this case. *See Bombardier Aerospace Corp.*, 572 S.W.3d at 220. As to a theory that Silver Fern was required to provide Plaintiffs with an SDS to accompany the initial invoice emails, Plaintiffs' complaint does not establish that any duty to disclose arose from this email correspondence. The original email, even absent an SDS, does not appear to be only partially true or convey a false impression.[19] *See Baxsto, LLC*, 668 S.W.3d at 933. The email provided Jake with an invoice and informed him that his next order would be processed for shipment. Further, according to the complaint, no new information later came to light that changed the nature of the original email. *Id.* Additionally, even if Plaintiffs were to plead

19. Plaintiffs' complaint also references an SDS that is much less inclusive than the SDS that accompanied the altered emails. Plaintiffs, however, do not disclose who provided this SDS to them. Further, even assuming that Silver Fern provided this SDS to Plaintiffs at some point, Plaintiffs do not articulate when it was provided, who at Silver Fern sent it, or to whom it was directed at Right Price. Thus, Plaintiffs' pleading in this respect fails to satisfy the demands of Rule 9(b). Moreover, even if Plaintiffs clearly articulated that this less comprehensive SDS was provided by Silver Fern, Plaintiffs do not explain how providing this SDS would have created a duty to provide a more inclusive SDS at a later point. That is, Plaintiffs do not demonstrate (or argue) that this SDS created a false impression, created a duty to disclose other information, or later became misleading. *See Bombardier Aerospace Corp.*, 572 S.W.3d at 220.

facts plausibly establishing that Silver Fern had a duty to disclose, they have failed to allege other essential elements of their nondisclosure claim. To that point, nothing in Plaintiffs' complaint plausibly alleges (or even asserts) that Plaintiffs "did not have an equal opportunity to discover" the facts contained in the SDS or that Silver Fern "intended [Plaintiffs] to act or refrain from acting based on the nondisclosure." *See Bombardier Aerospace Corp.*, 572 S.W.3d at 220. Even still, Plaintiffs state in a conclusory fashion only that they relied on Silver Fern's nondisclosure.

Next, regarding Plaintiffs' allegation that Silver Fern was required to disclose that it was ceasing its BDO sales, Silver Fern first argues that it owed Plaintiffs no duty to disclose. Yet again, Plaintiffs' complaint fails to establish that Silver Fern had a duty to disclose the facts regarding its departure from the BDO market. To be certain, Plaintiffs have alleged (and attached supporting exhibits) that Silver Fern planned to withhold news of its market exit from Plaintiffs. Plaintiffs' exhibits indicate that, instead of informing Plaintiffs of its departure, Silver Fern would (falsely) claim to suffer from BDO supply chain issues when telling Plaintiffs that it was unable to fill their orders. That said, and Silver Fern does not dispute this point, Plaintiffs' allegations clearly satisfy the deliberate concealment element of a nondisclosure claim. As noted above, however, Plaintiffs' complaint does not allege facts demonstrating that Silver Fern carried out this plan—namely, that, after formulating its plan to withhold this information, Silver Fern reached out to Plaintiffs, telling them half-truths or lying to them.

Nonetheless, Silver Fern withheld this information. Thus, the initial question is whether a duty to disclose existed. As previously discussed, no fiduciary duty, formal or informal, existed between the parties. Next, regarding a duty to disclose arising from either failing to disclose the whole truth, new material information, or disclosing information that created a false impression, Plaintiffs have again failed to set forth a plausible claim that such a duty arose in this case. *See id.*

Plaintiffs have not pleaded that Silver Fern discovered new information that made earlier information misleading, made some partial disclosure that created a false impression, or disclosed some information requiring the whole truth to be disclosed. Had Plaintiffs plausibly pleaded that Silver Fern told them of supply chain issues, this may have triggered a duty to disclose based on a false impression. Because Plaintiffs have not pleaded that such a communication occurred, however, Plaintiffs have not plausibly pleaded that Silver Fern owed Plaintiffs a duty to disclose its market exit. Moreover, even if such a duty existed, Plaintiffs have failed to allege other necessary elements of a nondisclosure claim.

Silver Fern contends that Plaintiffs' complaint fails to state that Silver Fern's decision not to inform Plaintiffs of its determination that it would no longer sell BDO "was intended to or did induce Plaintiffs' reliance." Silver Fern is correct—Plaintiffs do not plausibly allege facts supporting an allegation that Silver Fern intended Plaintiffs to rely on its nondisclosure. Further, Plaintiffs allege only in a conclusory manner that they did in fact

rely on this nondisclosure. Therefore, under any theory contemplated in their complaint, Plaintiffs have failed to allege a plausible claim for fraud by nondisclosure.

3. Constructive Fraud

Constructive fraud, another variant of common-law fraud, is "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Saden v. Smith*, 415 S.W.3d 450, 470 (Tex. App.-Houston [1st Dist.] 2013, pet. denied) (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). When constructive fraud is asserted, "the actor's intent is irrelevant." *Houle*, 594 S.W.3d at 564 (citing *In re Est. of Kuykendall*, 206 S.W.3d 766, 770 (Tex. App.-Texarkana 2006, no pet.)). "Constructive fraud may occur where one violates a fiduciary duty" or "a confidential relationship." *In re Est. of Kuykendall*, 206 S.W.3d at 770-71; *see Houle*, 594 S.W.3d at 564 ("As this Court has recognized, constructive fraud occurs when a party violates a fiduciary duty or breaches a confidential relationship." (citing *Holland v. Thompson*, 338 S.W.3d 586, 598 (Tex. App.-El Paso 2010, pet. denied))). Silver Fern asserts that, because Plaintiffs have failed to plead facts supporting the existence of any fiduciary duty or confidential relationship, this claim must also be dismissed. Plaintiffs did not even respond to this argument in their response to Silver Fern's motion. Nevertheless, as discussed above, Plaintiffs have failed to demonstrate that Silver Fern owed any duty, legal or equitable, to Plaintiffs. *See Guajardo v. JP Morgan Chase Bank*, 605 F. App'x

240, 247 & n.5 (5th Cir. 2015). Therefore, Plaintiffs have failed to plead a plausible claim for constructive fraud.[20]

4. Negligent Misrepresentation

Under Texas law, to recover for negligent misrepresentation, the plaintiff must establish:

> (1) a representation made by a defendant in the course of its business or in a transaction in which it has a pecuniary interest; (2) the representation conveyed "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

JPMorgan Chase Bank, N.A., 546 S.W.3d at 653-54 (quoting *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991)); *see Colbert v. Wells Fargo Bank, N.A.*, 850 F. App'x 870, 876 (5th Cir. 2021); *Life Partners Creditors' Tr. v. Cowley (In re Life Partners Holdings, Inc.)*, 926 F.3d 103, 123 (5th Cir. 2019).

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20. Indeed, in their complaint, Plaintiffs appear to argue that they are able to state a claim for constructive fraud by establishing the existence of a fiduciary duty between Silver Fern and themselves. Plaintiffs, however, have not provided any facts to support the existence of such a duty, as discussed in reference to Plaintiffs' nondisclosure claim.

Silver Fern contends that dismissal is appropriate as to Plaintiffs' negligent misrepresentation claim for the same reasons that their actual fraud claim is deficient. Silver Fern points out that Plaintiffs are unable to plead a plausible cause of action for negligent misrepresentation because the representation must be made to Plaintiffs or with the expectation that it be communicated to Plaintiffs (if initially communicated to a third party), and Plaintiffs must then rely on that representation. Silver Fern is again correct. For one, Plaintiffs have not stated a plausible claim for relief based on their assertion that Silver Fern provided altered emails to the Government. As previously discussed, under this theory, the misrepresentation was made to the Government rather than to Plaintiffs, and Plaintiffs do not assert that Silver Fern made this representation to the Government with the expectation that it would reach Plaintiffs. Further, Plaintiffs do not contend that they relied on or that Silver Fern intended for Plaintiffs to rely on the altered emails because, according to their complaint, it was the Government that relied on these emails when prosecuting the Daughtrys. Plaintiffs have not identified any other representation made by Silver Fern that would support their negligent misrepresentation claim. Thus, Plaintiffs have failed to plead a plausible claim based on negligent misrepresentation.

5. Justifiable Reliance

"Both common law fraud and negligent misrepresentation require a showing of actual and justifiable reliance." *Blankinship*, 399 S.W.3d at 308 (citing *AKB Hendrick, LP v. Musgrave Enters., Inc.*, 380 S.W.3d 221, 238 (Tex. App.-Dallas 2012, no pet.)). "Likewise,"

because fraud by nondisclosure is a subcategory of fraud, "reliance is a necessary element of fraud by nondisclosure." *Id.* (citing *Schlumberger Tech. Corp.*, 959 S.W.2d at 181). Accordingly, for Plaintiffs to allege a viable fraud or negligent misrepresentation claim, Plaintiffs must also plausibly plead that they justifiably relied on the information that Silver Fern did or did not disclose to them. Plaintiffs' theories, with respect to this element, suffer from marked defects.

To prove justifiable reliance, a plaintiff is required to show that "(1) it actually relied on the defendant's representation; and (2) such reliance was justifiable." *Baxsto, LLC*, 668 S.W.3d at 934-35 (citing *JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 653). As to each fraud or negligent misrepresentation claim, Plaintiffs have failed to allege, in more than a conclusory fashion, that they relied on the various statements or omissions with which they now take issue or that such reliance was justifiable. Further, based on Plaintiffs' pleadings, they appear to be unable to plead plausibly that their reliance (if any) was justifiable.

Regarding justifiable reliance, "[i]n an arm's-length transaction[,] the defrauded party must exercise ordinary care for the protection of his own interests. . . . [A] failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." *Id.* at 935 (quoting *JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 654); *see Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 425 (Tex. 2015). "And when a party fails to exercise such diligence, it is 'charged with knowledge of all facts that would have been discovered by a reasonably

prudent person similarly situated.'" *JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 654 (quoting *AKB Hendrick, LP*, 380 S.W.3d at 232). Furthermore, a "party 'cannot blindly rely on a representation by a defendant where the plaintiff's knowledge, experience, and background warrant investigation into any representations before the plaintiff acts in reliance upon those representations.'" *Id.* (quoting *Shafipour v. Rischon Dev. Corp.*, No. 11-13-00212-CV, 2015 WL 3454219, at *8 (Tex. App.-Eastland May 29, 2015, pet. denied)).

The only reliance theory arguably included in Plaintiffs' complaint that relates to their own conduct rather than the Government's alleges that Plaintiffs, specifically Right Price, relied on "critical information" (or the lack thereof) from Silver Fern "through the course of its dealings with [Right Price]." According to this theory, the "critical information" was contained in the later-added SDS, and the information on which Plaintiffs focus is, in their own words, "the fact that [the SDS] purports to tie [BDO] to the date rape drug GHB." Plaintiffs contend that this information was "never provided" to Right Price or the Daughtrys prior to the Daughtrys' prosecution. While Plaintiffs do not explain what specific actions they took in reliance, ostensibly, Plaintiffs' theory is that they continued to distribute BDO, being unaware of its relation to GHB, and, had they known of the relation, they would have ceased all BDO distribution or engaged in lawful distribution.[21] The exact theory is unclear and is

21. As discussed above, however, knowledge of BDO's relation to GHB alone in no way alters the basis on which the Daughtrys were prosecuted. The issue in the prosecution was whether the

not articulated in Plaintiffs' complaint. Significantly, this theory appears to relate only to conduct that Plaintiffs do not contend was fraudulent—that is, the initial emails Franco sent to Jake that did not include an SDS. Plaintiffs clarify in their complaint that "the fraud was committed" during Silver Fern's "relationship" with the Government, which did not begin until November 2019. Nonetheless, while there are numerous issues with this theory, in this instance, the relevant point is that Plaintiffs have not plausibly pleaded that their claimed reliance was justifiable.

Plaintiffs state in their complaint that, on December 4, 2019, in the days following the Government's initial subpoena requesting documents from Silver Fern, Right Price received an email from Silver Fern stating: "It has come to our attention that although [BDO] is not a controlled substance listed by the DEA, it can be diverted for illicit use," and noting: "We can ship this out ASAP, but before we ship this to you, we need to have you fill out another regulatory form from the DEA." Importantly, the acts of fraud about which Plaintiffs complain took place after Right Price received this email. After December 2019, however, Plaintiffs (even assuming they were not before) were clearly on notice of BDO's potential for misuse. Accordingly, Plaintiffs' complaint seems to negate any potential justifiable reliance on "critical information" provided or withheld by Silver Fern after this time.

Daughtrys knew that BDO was being consumed and knew that they were selling to unauthorized purchasers. Knowledge of exactly how BDO is absorbed and metabolized in their customers' bodies was not required for purposes of the prosecution.

Furthermore, the Daughtrys owned and operated a chemical distribution company, an industrial supply company, and a lab chemical supply company and employed a chemist. With that in mind, it is apparent that Plaintiffs' "knowledge, experience, and background" dictated an investigation into Silver Fern's representations. *See Baxsto, LLC*, 668 S.W.3d at 934-35; *JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 654. Through Right Price, the Daughtrys were purchasing chemicals from one company to then sell to individual consumers. They could not rely blindly on the information they received from their supplier. Indeed, it appears that a brief investigation into BDO would have revealed, among other things, its connection to GHB. Relevant to this point, Plaintiffs attached as an exhibit to their complaint a BDO fact sheet produced by the DEA, which plainly states BDO's relation to GHB. (#21, Ex. 11). Plaintiffs have not demonstrated why they should not be "charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated." *JPMorgan Chase Bank, N.A.*, 546 S.W.3d at 654 (quoting *AKB Hendrick, LP*, 380 S.W.3d at 232). In any event, Plaintiffs have failed to plead justifiable reliance adequately as to any of their fraud claims or their negligent misrepresentation claim.

B. Failure to Warn

Although Plaintiffs' complaint is vague as to exactly what cause of action they assert, Count Four of the complaint states "Failure to Warn by Silver Fern." As a result, Silver Fern assumes in its motion to dismiss that Plaintiffs are attempting to assert a "product liability

cause of action." In their response to the motion, Plaintiffs confirm that they are in fact attempting to assert a products liability cause of action.

"The Texas Supreme Court has explained that 'a defendant's failure to warn of a product's potential dangers when warnings are required is a type of marketing defect,'" and, in general, "a manufacturer has a duty to warn if it knows or should know of the potential harm to a user because of the nature of its product.'" *Smith v. Robin Am., Inc.*, 484 F. App'x 908, 912 (5th Cir. 2012) (quoting *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 426 (Tex. 1997)). To establish a claim for a marketing defect, a plaintiff must show five elements:

> (1) a risk of harm must exist that is inherent in the product or that may arise from the intended or reasonably anticipated use of the product, (2) the supplier of the product knows or reasonably should foresee the risk of harm at the time the product is marketed, (3) the product has a marketing defect, (4) the lack of instructions or warnings renders the product unreasonably dangerous to the ultimate user or consumer of the product, and (5) the failure to warn or instruct causes the user's injury.

Ranger Conveying & Supply Co. v. Davis, 254 S.W.3d 471, 480 (Tex. App.-Houston [1st Dist.] 2007, pet. denied) (citing *Olympic Arms, Inc. v. Green*, 176 S.W.3d 567, 578 (Tex. App.-Houston [1st Dist.] 2004, no pet.)); *see USX Corp. v. Salinas*, 818 S.W.2d 473, 482-83 (Tex. App.-San

Antonio 1991, writ denied) ("[T]he failure to warn and/or instruct must constitute a causative nexus in the product user's injury.").

Silver Fern resists Plaintiffs' claim by noting that "any actual injury from any alleged 'failure to warn' would be to the end user of the product," not to an intermediate distributor such as Right Price. Plaintiffs respond by contending that they were the "end user" of the product because Silver Fern claims that it had Right Price sign an "end user form." Nonetheless, the fact that Silver Fern required Right Price to sign an "end user form" to comply with its obligation to distribute BDO only to authorized purchasers does not transform Right Price, or any of Plaintiffs for that matter, into end users such that they may plausibly allege a products liability cause of action.

Plaintiffs are not the ultimate or end "users" of BDO in this case. They were a secondary distributor of the product. The Daughtrys did not "use" BDO; they purchased it from Silver Fern to sell to the ultimate and actual "user" of the product. Thus, although Plaintiffs allege injuries due to Silver Fern's failure to warn, they do not maintain that "the failure to warn or instruct cause[d] the user's injury," or, in other words, they do not allege that "the failure to warn . . . constitute[s] a causative nexus in the product user's injury." *See USX Corp.*, 818 S.W.2d at 483; *see also Ranger Conveying & Supply Co.*, 254 S.W.3d at 480. Nor would Plaintiffs be able to assert an action on behalf of the users. Moreover, the type of injury about which Plaintiffs complain does not involve the sort of "harm" these products liability actions are

intended to remedy. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 13 cmt. a (1998). That is, these actions are intended to remedy harm, inflicted upon product users, to their "persons or property," rather than harm caused by an intermediate distributor's failure to sell a product lawfully that it purchased from a prior distributor. *Cf. id.* On that note, the type of harm Plaintiffs assert also is not "inherent in the product" nor does it "arise from the intended or reasonably anticipated use of the product." *See Ranger Conveying & Supply Co.*, 254 S.W.3d at 480. Accordingly, Plaintiffs have failed to plead a plausible failure to warn cause of action.

C. Civil Conspiracy

"In Texas, a civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Bates Energy Oil & Gas, L.L.C. v. Complete Oil Field Servs., L.L.C.*, No. 20-50952, 2021 WL 4840961, at *3 (5th Cir. Oct. 15, 2021) (quoting *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996)); *accord Ernst & Young, L.L.P.*, 51 S.W.3d at 583. Under Texas law, the elements of a civil conspiracy claim are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Civelli v. J.P. Morgan Sec., L.L.C.*, 57 F.4th 484, 492 (5th Cir.) (quoting *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983)), *cert. denied*, 143 S. Ct. 2585 (2023); *accord WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 358 (5th Cir. 2021); *First United Pentecostal Church*

of Beaumont v. Parker, 514 S.W.3d 214, 222 (Tex. 2017). The goal of a conspiracy allegation is to extend liability in tort beyond the active wrongdoer to those who may have merely planned, assisted, or encouraged the wrongdoer. *Agar Corp., Inc. v. Electro Cirs. Int'l, LLC*, 580 S.W.3d 136, 140 (Tex. 2019).

As part of a civil conspiracy claim, a plaintiff is required to prove that one or more unlawful, overt acts were taken in pursuance of the unlawful objective. *WickFire, L.L.C.*, 989 F.3d at 358; *Parker*, 514 S.W.3d at 222. Under Texas law, "civil conspiracy is a theory of vicarious liability and not an independent tort." *Tummel v. Milane*, 787 F. App'x 226, 227 (5th Cir. 2019) (quoting *Agar Corp., Inc.*, 580 S.W.3d at 142). The Texas Supreme Court has "repeatedly called civil conspiracy a 'derivative tort,' meaning it depends on some underlying tort or other illegal act." *Agar Corp., Inc.*, 580 S.W.3d at 140-41; *accord WickFire, L.L.C.*, 989 F.3d at 358; *Tummel*, 787 F. App'x at 227. The "use of the word 'derivative' in this context means a civil conspiracy claim is connected to the underlying tort and survives or fails alongside it." *Agar Corp., Inc.*, 580 S.W.3d at 141; *accord WickFire, L.L.C.*, 989 F.3d at 358; *Midwestern Cattle Mktg., L.L.C. v. Legend Bank, N. A.*, 800 F. App'x 239, 248 (5th Cir. 2020). Thus, a "civil conspiracy requires some underlying wrong." *Agar Corp., Inc.*, 580 S.W.3d at 141. "If a plaintiff fails to state a separate underlying claim on which the court may grant relief, then a claim for civil conspiracy necessarily fails." *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 640 (5th Cir. 2007); *accord Agar Corp., Inc.*, 580 S.W.3d at 141. Accordingly, because Plaintiffs have failed to allege

any other plausible cause of action, they have also failed to allege a plausible civil conspiracy claim.[22]

In sum, Plaintiffs have failed to state any plausible claim for relief.[23] Accordingly, Plaintiffs' Amended Complaint must be dismissed.[24] In that regard, Defendants urge the court to dismiss Plaintiffs' complaint with prejudice.

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22. Moreover, "a general allegation of conspiracy[,] without a statement of the facts constituting that conspiracy, is only an allegation of a legal conclusion and is insufficient to constitute a cause of action." *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 631-32 (5th Cir. 1999) (quoting *McCleneghan v. Union Stock Yards Co. of Omaha*, 298 F.2d 659, 663 (8th Cir. 1962)); *accord Am. Realty Tr., Inc. v. Hamilton Lane Advisors, Inc.*, 115 F. App'x 662, 666 n.16 (5th Cir. 2004). Here, Plaintiffs have alleged in a conclusory fashion only that Silver Fern and Franco agreed with one another and others to injure Plaintiffs. These allegations are insufficient to state a claim for civil conspiracy.

23. Further, even if Plaintiffs were able to establish a *prima facie* case of personal jurisdiction as to Franco, for many of the same reasons discussed above regarding Silver Fern's conduct, Plaintiffs are unable to plead any legally cognizable claims against Franco (common law fraud, fraud by nondisclosure, constructive fraud, negligent misrepresentation, or civil conspiracy).

24. Because no Plaintiff has plausibly alleged any claim for relief, the court declines to reach Defendants' judicial estoppel argument, in which they contend that both Jake and Joseph are estopped from asserting the above claims in contravention of their guilty pleas.

V. Opportunity to Amend

As a general matter, a court should not dismiss an action for failure to state a claim under Rule 12(b)(6) without first giving the plaintiff an opportunity to amend. *See Hart v. Bayer Corp.*, 199 F.3d 239, 248 n.6 (5th Cir. 2000) (plaintiff's failure to meet the specific pleading requirements should not automatically or inflexibly result in dismissal of the complaint with prejudice to refiling); *see also Strickland v. Bank of N.Y. Mellon*, 838 F. App'x 815, 821 (5th Cir. 2020); *Young v. U.S. Postal Serv. ex rel. Donahoe*, 620 F. App'x 241, 245 (5th Cir. 2015); *accord* FED. R. CIV. P. 16(b).

Where, however, "the defect is simply incurable or the plaintiff has failed to plead with particularity after being afforded repeated opportunities to do so," a court may dismiss a plaintiff's claims without such an opportunity. *Hart*, 199 F.3d at 248 n.6. "The district court properly exercises its discretion . . . when it denies leave to amend for a substantial reason, such as undue delay, repeated failures to cure deficiencies, undue prejudice, or futility." *Stevens v. St. Tammany Par. Gov't*, 17 F.4th 563, 575 (5th Cir. 2021) (quoting *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 367 (5th Cir. 2014)).

Here, Plaintiffs seek an opportunity to amend their complaint once again to cure any defects, but it appears that additional amendments would be unavailing in this situation. For the reasons discussed above, Plaintiffs are unable to plead a viable claim for any variant of fraud, negligent misrepresentation, failure to warn, or civil

conspiracy, and, as such, leave to amend would be futile. Plaintiffs have already amended their complaint once in this action—in the face of two motions to dismiss—and Plaintiffs amended their complaint three times in the prior federal court matter against Defendants (Civil Action No. 1:22-CV-239, #s 7, 32, 47). Hence, Plaintiffs have been afforded ample opportunity to rectify any pleading defects. Moreover, upon asking for leave to amend at this stage in the proceedings, Plaintiffs have not indicated what additional facts they "could plead that would correct the deficiencies in [their] previous complaints." *U.S. ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 404 (5th Cir. 2004)*; see Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 551 n.38 (5th Cir. 2010). Therefore, granting leave to amend is unwarranted.

VI. Conclusion

Accordingly, both Franco's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) (#23) and Silver Fern's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim (#25) are GRANTED. Plaintiffs' complaint is DISMISSED with prejudice.

SIGNED at Beaumont, Texas, this 16th day of May, 2024.

/s/
Marcia A. Crone
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40400

JAKE ELLIS DAUGHTRY; SANDRA MILLER DAUGHTRY; JOSEPH ELLIS DAUGHTRY; JAKE'S FIREWORKS; RIGHT PRICE CHEMICALS, L.L.C.; BEST BUY INDUSTRIAL SUPPLY L.L.C.; LAB CHEMICAL SUPPLY L.L.C.; DAUGHTRY INVESTMENTS L.L.C.,

Plaintiffs-Appellants,

versus

SILVER FERN CHEMICAL, INCORPORATED; GILDA FRANCO,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:23-CV-343

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before SMITH, HIGGINSON, and DOUGLAS, *Circuit Judges*.

Appendix C

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5th CIR. R.40), the petition for rehearing en banc is DENIED.