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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. _____

IN THE SUPREME COURT OF TEXAS

IN RE SOUTHWESTERN ENERGY COMPANY, *et al.*
Relators

On Petition for Writ of Mandamus
to the 61st Judicial District Court, Harris County, Texas
St. Lucie Cty. Fire Dist. Firefighters' Pension Tr. v. Sw. Energy Co., et al.,
No. 2016-70651
The Honorable Fredericka Phillips, presiding

PETITION FOR WRIT OF MANDAMUS

EMERGENCY RELIEF REQUESTED

Thomas R. Phillips
State Bar No. 00000022
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701

Aaron M. Streett
State Bar No. 24037561
J. Mark Little
State Bar No. 24078869
Anthony J. Lucisano
State Bar No. 24102118
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002

Noelle M. Reed
State Bar No. 24044211
Wallis M. Hampton
State Bar No. 00784199
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1000 Louisiana Street, Suite 6800
Houston, Texas 77002

Scott D. Musoff
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(*motion for admission pro hac vice forthcoming*)

Ellen Sessions
State Bar No. 00796282
Rodney Acker
State Bar No. 00830700
NORTON ROSE FULBRIGHT US LLP
2200 Ross Avenue, Suite 3600
Dallas, Texas 75201

Mark Oakes
State Bar No. 24062923
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701

Counsel for Relators

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Southwestern Relators

Southwestern Energy Company
Stephen L. Mueller
R. Craig Owen
Josh C. Anders
John D. Gass
Catherine A. Kehr
Greg D. Kerley
Terry L. Rathert
Vello A. Kuuskraa
Kenneth R. Mourton
Elliott Pew
Alan H. Stevens

Underwriter Relators

Merrill Lynch, Pierce, Fenner & Smith Incorporated
Citigroup Global Markets, Inc.
J.P. Morgan Securities LLC
Wells Fargo Securities, LLC
BNP Paribas Securities Corp.
RBS Securities Inc.
BMO Capital Markets Corp.
Mitsubishi UFJ Securities (USA), now known as, MUFG Securities America, Inc.
Mizuho Securities USA LLC, f/k/a Mizuho Securities USA Inc.
SMBC Nikko Securities America, Inc.
BBVA Securities Inc.
Credit Agricole Securities (USA) Inc.
RBC Capital Markets, LLC
CIBC World Markets Corp.
SG Americas Securities, LLC
BB&T Capital Markets, a division of BB&T Securities, LLC
Robert W. Baird & Co. Incorporated
Comerica Securities, Inc.
Fifth Third Securities, Inc.
HSBC Securities (USA) Inc.
Heikkinen Energy Securities, LLC

Keybanc Capital Markets Inc.
Macquarie Capital (USA) Inc.
PNC Capital Markets LLC
Scotia Capital (USA) Inc.
Tudor, Pickering, Holt & Co. Securities, Inc., n/k/a Tudor, Pickering, Holt & Co. Securities, LLC
U.S. Bancorp Investments, Inc.

Counsel for Southwestern Energy Company

Thomas R. Phillips
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
Telephone: (512) 322-2565
Facsimile: (512) 322-8363

Aaron M. Streett
J. Mark Little
Anthony J. Lucisano
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
Telephone: (713) 229-1855
Facsimile: (713) 229-7855

Counsel for Southwestern Relators

Noelle M. Reed
Wallis M. Hampton
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1000 Louisiana Street, Suite 6800
Houston, Texas 77002

Scott D. Musoff
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(*motion for admission pro hac vice forthcoming*)

Counsel for Underwriter Relators

Ellen Sessions
Rodney Acker
NORTON ROSE FULBRIGHT US LLP
2200 Ross Avenue, Suite 3600
Dallas, Texas 75201

Mark Oakes
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701

Respondent

The Honorable Fredericka Phillips, 61st Judicial District Court, Harris County, Texas

Real Party in Interest

St. Lucie County Fire District Firefighters' Pension Trust, Individually and on Behalf of All Others Similarly Situated

Counsel for Real Party in Interest

Thomas E. Bilek
THE BILEK LAW FIRM, L.L.P.
700 Louisiana Street, Suite 3950
Houston, Texas 77002

Beth A. Kaswan
Donald A. Broggi
Thomas L. Laughlin
Randy L. Moonan
SCOTT + SCOTT ATTORNEYS AT LAW LLP
230 Park Avenue, 17th Floor
New York, New York 10169

David R. Scott
Amanda Lawrence
SCOTT + SCOTT ATTORNEYS AT LAW LLP
156 South Main Street
P.O. Box 192
Colchester, Connecticut 06415

John T. Jasnoch
SCOTT + SCOTT ATTORNEYS AT LAW LLP
600 West Broadway, Suite 3300
San Diego, California 92101

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ABBREVIATIONS

"Defendants"	Southwestern, Southwestern's officers and directors, and the Underwriter Defendants, collectively
"Plaintiff"	St. Lucie County Fire District Firefighters' Pension Trust
"PSLRA"	Private Securities Litigation Reform Act
"Section 11"	Section 11 of the Securities Act, 15 U.S.C. § 77k
"Section 12"	Section 12 of the Securities Act, 15 U.S.C. § 77*l*
"Securities Act"	Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*
"SLUSA"	Securities Litigation Uniform Standards Act
"Southwestern"	Defendant Southwestern Energy Company
"Underwriter Defendants"	Defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated; Citigroup Global Markets, Inc.; J.P. Morgan Securities LLC; Wells Fargo Securities, LLC; BNP Paribas Securities Corp.; RBS Securities Inc.; BMO Capital Markets Corp.; Mitsubishi UFJ Securities (USA), now known as, MUFG Securities America, Inc.; Mizuho Securities USA LLC, f/k/a Mizuho Securities USA Inc.; SMBC Nikko Securities America, Inc.; BBVA Securities Inc.; Credit Agricole Securities (USA) Inc.; RBC Capital Markets, LLC; CIBC World Markets Corp.; SG Americas Securities, LLC; BB&T Capital Markets, a division of BB&T Securities, LLC; Robert W. Baird & Co. Incorporated; Comerica Securities, Inc.; Fifth Third Securities, Inc.; HSBC Securities (USA) Inc.; Heikkinen Energy Securities, LLC; Keybanc Capital Markets Inc.; Macquarie Capital (USA) Inc.; PNC Capital Markets LLC; Scotia Capital (USA) Inc.; Tudor, Pickering, Holt & Co. Securities, Inc., n/k/a Tudor, Pickering, Holt & Co. Securities, LLC; and U.S. Bancorp Investments, Inc.

STATEMENT OF THE CASE

Nature of the Case:	This is a putative class action against Southwestern Energy Company ("Southwestern"), certain officers and directors, and the underwriters (the "Underwriter Defendants"), alleging violations of Sections 11, 12, and 15 of the federal Securities Act of 1933 (the "Securities Act") in connection with Southwestern's January 2015 offering of preferred stock. R.6. Specifically, Plaintiff's Original Petition, filed October 17, 2016, alleged that Southwestern did not adequately disclose certain "liquidity and debt issues" during that offering. R.17. Defendants removed the case to federal district court, but after the U.S. Supreme Court held that actions asserting only Securities Act claims are non-removable, the court remanded the case on April 10, 2018. R.28, 155. Post-remand, Defendants filed a motion to dismiss Plaintiff's Original Petition under Texas Rule of Civil Procedure 91a. R.156. Plaintiff responded by amending its petition on May 25, 2018 to assert new claims based on alleged misstatements or omissions related to the value of Southwestern's oil-and-gas reserves on recently acquired properties and other matters not included in the Original Petition. R.351. Defendants moved again to dismiss under Rule 91a, arguing that Plaintiff's newly added claims were time-barred under the Securities Act's statute of repose and that none of the alleged misstatements or omissions was a valid basis for liability under the federal securities laws. R.400.
Trial Court (Respondent):	The Honorable Fredericka Phillips, 61st Judicial District Court of Harris County, Texas.
Trial Court's Action:	The trial court denied Defendants' amended motion to dismiss under Rule 91a on August 14, 2019. R.1001 (attached as App. A).
Court of Appeals:	First Court of Appeals, Houston, Texas (Keyes, Landau, and Countiss, JJ.).

Court of Appeals' Disposition:	Relators filed a petition for writ of mandamus and emergency motion for stay in the First Court of Appeals on September 25 and 26, 2019, respectively. R.918, 1005. Justice Countiss, acting individually, denied Defendants' motion for stay on October 22, 2019. R.1018. After calling for a response, a panel of the court comprised of Justices Keyes, Landau, and Countiss denied the petition on February 11, 2020. *In re Sw. Energy Co.*, No. 01-19-00711-CV, 2020 WL 625300 (Tex. App.—Houston [1st Dist.] Feb. 11, 2020, orig. proceeding) (mem. op.) (per curiam) (attached as App. B).

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue the writ of mandamus sought in this petition under Article V, Section 3(a) of the Texas Constitution, Section 22.002(a) of the Texas Government Code, and Rule 52 of the Texas Rules of Appellate Procedure. The petition was presented first to the First Court of Appeals, which denied the petition on February 11, 2020. *In re Sw. Energy Co.*, No. 01-19-00711-CV, 2020 WL 625300 (Tex. App.—Houston [1st Dist.] Feb. 11, 2020, orig. proceeding) (mem. op.) (per curiam).

ISSUES PRESENTED

Issue One

To combat the extraordinary costs and undue settlement pressure that meritless securities class actions inflict on American businesses, Congress enacted substantive protections that require trial courts to play an important gatekeeping role in dismissing such claims at the pleading stage. Following the U.S. Supreme Court's recent decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, state courts are now often responsible for applying that federal scheme to suits under the Securities Act.

Should a Texas court apply substantive federal gatekeeping principles when ruling on a Rule 91a motion to dismiss a federal securities suit?

Issue Two

Whether, under a proper application of substantive federal law, the Securities Act's three-year statute of repose bars the new bases for liability that Plaintiff added in its amended petition more than three years after the January 2015 preferred-stock offering at issue?

Issue Three

Whether, under a proper application of the substantive federal law that requires a contextual assessment of alleged material misstatements, Defendants' SEC-compliant disclosure of an oil-and-gas reserves estimate "as of" a specified date should subject them to staggering securities liability simply because risks they disclosed about commodity prices and operational matters came to pass?

Issue Four

Whether Defendants lack an adequate remedy at law from the trial court's denial of their Rule 91a motion?

[Unbriefed] Issue Five

Whether Plaintiff failed to identify any material and actionable misleading statement or omission?

[Unbriefed] Issue Six

Whether Defendants' challenged statements are non-actionable opinions under federal securities law?

[Unbriefed] Issue Seven

Whether Plaintiff's newly added claims are barred by the Securities Act's one-year statute of limitations?

[Unbriefed] Issue Eight

Whether, if this Court orders the trial court to reconsider the motion to dismiss, the PSLRA stay of discovery would apply in the trial court?

INTRODUCTION

As then-Justice Rehnquist observed nearly a half-century ago, securities class actions present a "danger of vexatiousness different in degree and kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). "[N]uisance filings, targeting of deep-pocket defendants, [and] vexatious discovery requests" are common. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). Such abuses result in "extortionate settlements" and have a "chill[ing]" effect on "any discussion of issuers' future prospects," thereby "injur[ing] the entire U.S. economy." *Id.* (internal quotation marks omitted).

Congress targeted these abuses in 1995's Private Securities Litigation Reform Act ("PSLRA"). The PSLRA, coupled with other substantive securities-law principles, gives courts tools to dispose of meritless suits at the pleading stage. Federal courts, which traditionally heard most cases under the Securities Act of 1933 ("Securities Act"), take their gatekeeping role seriously, dismissing at the pleading stage 42% of such cases filed between 2011 to 2018. Michael Klausner, et al., *State Section 11 Litigation in the Post*-Cyan *Environment*, Stanford Securities Litigation Analytics at 10 ("Klausner").[1]

[1] https://www-cdn.law.stanford.edu/wp-content/uploads/2019/04/State-Section-11-White-Paper_FINAL.pdf.

But this dynamic is in danger. In *Cyan, Inc. v. Beaver County Employees Retirement Fund*, the U.S. Supreme Court resolved a split in lower courts and held that state-court cases asserting only Securities Act violations cannot be removed to federal court. 138 S. Ct. 1061, 1069-76 (2018). In *Cyan*'s wake, Securities Act plaintiffs have flocked to state courts—where the 19% dismissal rate in Securities Act cases is less than half of that for federal forums. Klausner at 10. Indeed, last year "filings in state courts with [Securities] Act claims exceeded those in federal courts." Cornerstone Research, Securities Class Actions Filings—2019 Year in Review ("Cornerstone") at 4.[2]

This Securities Act class action illustrates the problem. Plaintiff alleges primarily that Southwestern's oil-and-gas reserves estimate disclosure was rendered misleading by a later fall in commodities prices, even though Southwestern explicitly stated its estimate was "as of" a specified date; was calculated according to SEC-mandated methodology; and disclosed the ongoing downturn in the commodities market and its potential negative effect on reserves. Plaintiff's theory of liability was not only time-barred under the federal statute of repose, but it also had been rejected by federal courts in their dismissal of similar claims under the substantive federal law for assessing material omissions. Yet

[2] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.pdf.

Plaintiff escaped dismissal by bringing its baseless claim in Texas state court, improperly invoking Texas *procedure* to evade federal *substantive* protections.

If allowed to stand, that result could make Texas a magnet for litigants seeking to evade the rigorous "national standards" that govern Securities Act cases. *Dabit*, 547 U.S. at 87. The motion-to-dismiss stage is a watershed moment in securities cases. A wrongful denial can pressure innocent defendants to settle to avoid staggering discovery costs, distraction from operations, and even a miniscule risk of a crippling verdict. Since any eventual victory will be Pyrrhic at best, most rational defendants will decide to settle. Permitting plaintiffs to invoke Texas pleading standards to sneak substantively meritless securities cases past this critical juncture would impose massive costs on the state's economy. The reserves-estimate claim in particular poses a stark threat to Texas energy companies. The Court should grant the petition and declare that Texas courts must honor federal law's robust substantive protections when confronting Rule 91a motions in Securities Act cases.

STATEMENT OF FACTS

I. After purchasing oil-and-gas properties, Southwestern makes a preferred-stock offering.

Southwestern, a Texas-based exploration-and-production company, agreed to purchase oil-and-gas leases from Chesapeake Energy in 2014. R.353. As part of its due diligence, Southwestern prepared a reserves estimate of the value of

hydrocarbons that could be produced economically "as of" June 2014—the valuation point that determined the property's purchase price—and an engineering firm audited the "proved"—*i.e.*, reasonably certain—component of that estimate. R.567-68, 576. As Southwestern disclosed, a reserves estimate depends heavily on then-existing commodities prices, which are notoriously volatile. R.683-84.

In January 2015, Southwestern conducted an offering of approximately $1.7 billion in preferred stock. R.352. Southwestern's "registration statement" filed with the SEC in connection with the offering included a "prospectus" describing Southwestern's business, its financial outlook, and risks facing would-be investors. R.358. It incorporated by reference other Southwestern SEC filings (collectively, "Offering Documents"). R.358-59, 525.

Southwestern's Offering Documents incorporated its previously published reserves estimate "as of" June 2014 but repeatedly cautioned investors that (1) natural gas prices had declined since then, (2) a prolonged price dip could have "a material adverse effect on [its] financial position, [the] results of [its] operations, [its] access to capital and the quantities of natural gas and oil that [it could] produce economically," and thus (3) "actual . . . reserves will most likely vary from those estimated." R.560-61, 576. Southwestern also disclosed that its due diligence into the Chesapeake acquisition had revealed operational issues—including environmental and title issues—but that it could not yet "fully assess [the

properties'] deficiencies." R.561-62, 653. Southwestern further warned that "integration of significant acquisitions may be difficult." R.561.

II. After Southwestern suffers from an industry-wide downturn, Plaintiff files its original petition, Defendants remove, and the case is remanded to state court after *Cyan*.

After Southwestern's offering, a historic downturn in the energy industry caused oil-and-gas prices to plummet even further. R.390. This caused Southwestern to write down the value of the Chesapeake properties by $2.8 billion and reevaluate its business plans. R.390-92. Southwestern's stock price fell, losing over a billion dollars of market capitalization. R.352.

Seizing on these events, Plaintiff brought suit on October 17, 2016, against Southwestern, certain officers and directors, and the Underwriter Defendants (who helped Southwestern sell the preferred stock), alleging violations of Sections 11, 12, and 15 of the Securities Act and seeking damages based on the stock drop. R.1, 352. Those provisions impose liability on the issuer of a registration statement (Section 11) or prospectus (Section 12) that contains "an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading," 15 U.S.C. §§ 77k(a), 77*l*(a), and on certain individuals (Section 15) for derivative liability as "controlling persons," *id.* § 77o.

Plaintiff's Original Petition alleged that Southwestern failed to disclose "events or uncertainties that have had or are reasonably likely to cause [its] financial information not to be indicative of future operating results" and that it was "experiencing severe liquidity and debt issues." R.17. It said nothing about the Chesapeake reserves estimate.

Defendants removed to federal district court, which initially denied Plaintiff's motion to remand. R.28. But it remanded after the U.S. Supreme Court decided *Cyan*. R.155.

III. Defendants move to dismiss, Plaintiff responds by amending to add an entirely new basis of liability, and Defendants move to dismiss again.

Defendants moved to dismiss under Rule 91a. R.156. Plaintiff filed an Amended Petition on May 25, 2018, reasserting its "liquidity and debt" allegations before dedicating 36 of its 46 factual-allegation paragraphs to an entirely new basis of liability: that Southwestern's June 2014 Chesapeake reserves estimate was "based on outdated pricing and cost assumptions" and did not factor in later-discovered "operational issues" ("Chesapeake Claims"). R.383.

Defendants amended their Rule 91a motion, arguing that Plaintiff's claims had "no basis in law" for two principal reasons. First, the Chesapeake Claims were barred by the Securities Act's three-year statute of repose because they were added over three years after Southwestern's January 2015 offering. R.417-22. Second, none of the alleged misstatements or omissions were actionable under the

Securities Act because, *inter alia*, they were not "material" under federal securities law. R.422-36. The trial court denied that motion on August 14, 2019. R.1001.

Defendants sought mandamus relief and an emergency stay in the First Court of Appeals on September 25 and 26, 2019, respectively. R.918, 1005. The court denied the stay on October 22, 2019, R.1018, and the petition on February 11, 2020. *Sw. Energy*, 2020 WL 625300.

SUMMARY OF THE ARGUMENT

Plaintiff improperly leveraged Texas's notice-pleading standard and a watered-down understanding of Rule 91a to circumvent the federal substantive protections afforded defendants in securities class actions. As state-court Securities Act cases proliferate after *Cyan*, Texas courts need guidance on applying Rule 91a to meritless cases brought under that Act, lest Texas become a haven for the type of *in terrorem* securities class actions that Congress sought to eliminate.

The trial court should have dismissed Plaintiff's claims under federal securities law. Plaintiff's primary theory of liability—the reserves-based Chesapeake Claims—was added after the Securities Act's three-year statute of repose expired. Federal law is clear that the mere filing of a Securities Act suit within the repose period does not give plaintiffs license to add entirely new bases for liability years later.

The Chesapeake Claims also should have been dismissed because they lack a basis in law on the merits. Federal securities law forecloses liability when accurate historical data—such as Southwestern's June 2014 reserves estimate—is not couched as a predictor of future performance, even when plaintiffs protest that intervening events made that historical data misleading. That principle applies even more strongly where intervening events (*e.g.*, a commodities price decline) that affect value were publicly known and disclosed by the issuer. Accepting Plaintiff's theory would contravene those basic precepts of federal law and transform virtually every reserves-estimate disclosure into a federal securities claim should prices fall.[3]

ARGUMENT

I. Texas courts must apply federal substantive law to dismiss meritless federal Securities Act suits under Rule 91a.

Plaintiff attempted to avoid the strictures of federal securities law by declaring that "Texas procedure . . . applies . . . to the analysis of this complaint, not a convoluted federal law," R.901, and arguing that Defendants' statute-of-repose defense "would fly in the face of liberally allowing amendment in Texas," R.884. This Court should not allow enterprising post-*Cyan* plaintiffs to distort Texas's pleading standards to defeat substantive federal protections.

[3] Plaintiff's ancillary claims regarding other alleged misstatements suffer from similar matter-of-law defects. *See supra* Unbriefed Issues 5 and 6.

Plaintiff's gambit founders on two legal truths. First, Rule 91a is a close cousin to its counterpart in Federal Rule 12(b)(6). Because the standard is similar under both rules, Texas courts should look to federal securities precedent applying Rule 12(b)(6) when addressing motions to dismiss. Second, even if the procedural standards were not similar, Texas rules should not be manipulated to undermine federal substantive protections. This case presents an opportunity to confirm both principles and instruct Texas courts on how to analyze the coming wave of Securities Act class actions.

A. Rule 91a is fundamentally similar to the federal Rule 12(b)(6) dismissal standard.

Below, Plaintiff argued—apparently successfully—for a vanishingly narrow understanding of Rule 91a. In Plaintiff's view, Texas's notice-pleading standard immunizes a claim from Rule 91a dismissal so long as the plaintiff "list[s] the elements of a claim and . . . provide[s] Defendants with notice." R.1054. On that basis, Plaintiff convinced the courts to look past adverse federal case law dismissing similar securities actions on the ground that "the Texas standard is far more lenient." R.1067.

But Rule 91a is not so toothless. In *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, the Court held that Rule 91a "does not limit the universe of legal theories by which the movant may show that the claimant is not entitled to relief." 2020 WL 938618, at *2 (Tex. Feb. 21, 2020). For example, "Rule 91a

permits motions to dismiss based on affirmative defenses"—such as statutes of repose—if they are conclusively established by the plaintiff's petition. *Id.* at *3. Thus, contrary to Plaintiff's arguments, merely "list[ing] the elements" and giving "notice" of a claim, R.1054, does not suffice if a plaintiff's theory is "legally invalid" as pleaded. *In re Houston Specialty Ins. Co.*, 569 S.W.3d 138, 142 (Tex. 2019) (orig. proceeding) (per curiam). Defendants' grounds for dismissal fit that framework, as they identify matter-of-law defects apparent from the petition. *See infra* Parts II-III.

Rule 91a's text confirms that broad scope. A party "may move to dismiss a cause of action on the grounds that it has no basis in law or fact," and a cause of action with "no basis in law" is one in which the "allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." Tex. R. Civ. P. 91a.1. In that way, Rule 91a resembles the 12(b)(6) standard mandating dismissal upon "failure to state a claim upon which relief can be granted."

Indeed, many Texas courts analogize Rule 91a to Rule 12(b)(6). *See, e.g.*, *Aguilar v. Morales*, 545 S.W.3d 670, 676 (Tex. App.—El Paso 2017, pet. denied); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied); *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Plaintiff, however, latched onto the only dissenting

court. R.1067-68 (citing *In re Butt*, 495 S.W.3d 455, 461 (Tex. App.—Corpus Christi 2016, orig. proceeding)).

This Court should resolve that split and confirm the substantial overlap between Rule 91a and Rule 12(b)(6). Guidance is essential, both for trial courts engaging in workaday motion-to-dismiss practice, and especially for state courts adjudicating federal securities claims for which the body of available precedent lies almost entirely in federal reporters.

B. Plaintiffs cannot misuse Texas procedural rules to evade substantive protections of federal securities law.

For as long as there have been substantive federal protections for securities defendants, there have been plaintiffs who sought to evade them. The practice peaked following enactment of the PSLRA, which was "targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. "Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law, often in state court." *Id.* at 82.

Congress responded by enacting the Securities Litigation Uniform Standards Act ("SLUSA") in 1998 to preempt such state-law suits and thereby "prevent certain State private securities class actions" from evading the PSLRA. *Id.* By channeling securities class actions into federal statutory claims, SLUSA furthered

the "congressional preference for national standards for securities class action lawsuits involving nationally traded securities." *Id.* at 87.

Although SLUSA eliminated state *law* as a means to bypass the PSLRA, plaintiffs now seek to use state *forums* to achieve the same end—at least for Securities Act suits after *Cyan*. Thus, although Plaintiff brought a federal securities claim, it persuaded a state court to use Texas's notice-pleading standards to gut substantive federal protections.

Two examples illustrate the point. First, the Securities Act's three-year repose period is a "substantive right" governed by federal law. *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013); *Nexen Inc. v. Gulf Interstate Eng'g Co.*, 224 S.W.3d 412, 417 n.4 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("statute[] of repose [is] substantive, rather than procedural"). Despite that, Plaintiff convinced the trial court that Texas's notice-pleading standard and liberal amendment rules controlled the repose question. R.807-08 (disagreeing with Defendant's repose argument "*even if* federal law applied, which it does not"); R.756 (disregarding federal repose cases because they allegedly conflicted "with the applicable Texas court decisions"). Plaintiff thus evaded a federal substantive safeguard under the guise of Texas procedural law.

Second, materiality is a critical element of Securities Act claims upon which "many [Securities Act] cases have been properly dismissed on the pleadings."

Kapps v. Torch Offshore, Inc., 379 F.3d 207, 216 (5th Cir. 2004).[4] A fact is material only if there exists "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). That binding federal interpretation requires courts to examine allegedly false or misleading statements "in the *context* of the [public filing] *as a whole*." *Kapps*, 379 F.3d at 211 (emphases added). Courts may not focus "myopic[ally]" on a particular statement or wear blinders to ignore the "total mix of information in the public domain."[5] *Stadnick v. Vivint Solar, Inc.*, 861 F.3d 31, 38 (2d Cir. 2017).

Yet Plaintiff invoked Texas procedural principles to persuade the trial court to eschew a holistic analysis. R.902 ("I don't think this is appropriate because we're looking beyond the pleadings . . . ."); R.1067 (disagreeing that the "federal

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[4] "Materiality" is a term of art in securities law. *See generally* Brent A. Olsen, *Materiality*, 1 Publicly Traded Corporations Handbook § 4:3 (2019). An issuer has no duty to disclose "all material information." *Kapps*, 379 F.3d at 213. Rather, the issuer simply must not "make material misrepresentations, or . . . omit material information that is either required to be disclosed by law or that is necessary to disclose in order to prevent statements made in the registration statement from being misleading." *Id.*

[5] For this reason, federal courts routinely consider a defendant's public filings at the pleading stage if they are referenced in a plaintiff's complaint. *E.g.*, *Izadjoo v. Helix Energy Sols. Grp., Inc.*, 237 F. Supp. 3d 492, 506 (S.D. Tex. 2017). Rule 91a also allows consideration of those documents, since it requires courts to decide motions "based solely on the pleading of the cause of action, together with any *pleading exhibits* permitted by Rule 59." Tex. R. Civ. P. 91a.6 (emphasis added). Rule 59 in turn allows for "written instruments" to "be deemed a part" of pleadings if referenced "in the body of the pleading," as Southwestern's Offering Documents were. Tex. R. Civ. P. 59.

standard" applies to materiality-pleading issues). Indeed, the trial court questioned whether the federally mandated context was "something [it is] supposed to look at" because it "seems like . . . something that a fact finder" should examine. R.893-94.

Left uncorrected, Plaintiff's approach offers a roadmap for bringing nominally "federal" securities actions in Texas courts to circumvent federal substantive protections. That would revive the very harm that Congress sought to eliminate in SLUSA: "parallel class actions proceeding in state and federal court, with *different standards* governing claims asserted on identical facts." *Dabit*, 547 U.S. at 86 (emphasis added). And it would make Texas courts a magnet—much like California has become[6]—for Securities Act plaintiffs bent on achieving the same end-run executed here.

II. The federal statue of repose bars most of Plaintiff's claims.

The Securities Act's statute of repose places an absolute three-year post-offering time limit on all claims: "In no event shall any such action be brought to enforce a liability created under [the Securities Act] more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m. It operates as a "complete defense to any suit [brought] after [that three-year] period." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). Despite first

[6] Cornerstone at 19; Klausner at 5-6.

asserting its Chesapeake Claims in its May 25, 2018 Amended Petition—over three years after the January 2015 offering—Plaintiff evaded the statute of repose by arguing that (1) affirmative defenses are categorically unavailable in Rule 91a motions and (2) a plaintiff satisfies the statute of repose by bringing *any* Securities Act claim related to the offering within the three-year period, even if it adds entirely new bases of liability years later. R.754-56, 806-87. Neither argument withstands scrutiny.

A. *Bethel* confirms that Rule 91a motions may invoke affirmative defenses.

Plaintiff contended below that Rule 91a dismissals cannot invoke affirmative defenses. *E.g.*, R.805 ("A Rule 91a motion cannot be used to dismiss a petition based on statute of repose . . . ."); R.1063-64 (same). Not so, this Court held: "Rule 91a permits motions to dismiss based on affirmative defenses . . . [that are] conclusively established by the facts in a plaintiff's petition." *Bethel*, 2020 WL 938618, at *3.

Repose was established here on the face of Plaintiff's pleadings, which reflected: (1) the January 2015 offering date, R.352, (2) the date (over three years later) of Plaintiff's Amended Petition, R.351, and (3) the Chesapeake Claims' first appearance in the Amended Petition, R.357. As discussed below, that *Bethel*-mandated analysis leads to dismissal. Thus, Plaintiff's threshold attempt to use

Texas procedure to thwart federal substantive protections has now been foreclosed by this Court.

B. Plaintiff's pleadings demonstrate the Chesapeake Claims are barred under the three-year statute of repose.

The Securities Act's statute of repose is absolute, subject neither to "tolling," *ANZ*, 137 S. Ct. at 2050, nor to the "relation back" doctrine, *FDIC for Colonial Bank v. First Horizon Asset Sec. Inc.*, 291 F. Supp. 3d 364, 374 (S.D.N.Y. 2018). Indeed, the repose provision's "text, purpose, structure, and history" reflect its intent to "grant complete peace to defendants" after the three-year mark. *ANZ*, 137 S. Ct. at 2052. It thereby "protects the defendant from an interminable threat of liability" so that the defendant can "calculate its potential liability or set its own plans for litigation with . . . precision." *Id.* at 2050, 2053.

Plaintiff upended that legislative balance by arguing that, so long as a plaintiff files a Securities Act suit related to an offering within the three-year window, it may timely amend that suit even *after* the repose period to add new claims based upon entirely different misstatements, omissions, and facts. R.753 ("The original filing of the petition 'brought' the Securities Act claims and thereby stopped the statute of repose from running . . . ."); R.806 ("Texas law does not permit dismissal when, as here, the amended petition alleges the same parties and legal claim as a timely filed original petition."). Plaintiff's theory would destroy repose, as defendants would have no notice at the three-year mark of the scope of

claims against them or their potential liability exposure. Once a plaintiff files a timely placeholder Securities Act suit about a single statement in an offering, the defendant remains in years-long suspense waiting for the plaintiff to add innumerable potential claims arising from hundreds of pages of potentially challengeable statements.

Unsurprisingly, the leading federal courts for securities cases have rejected Plaintiff's argument, holding that an amendment is barred by repose if it asserts a new theory of liability and is filed after the three-year period. *See, e.g.*, *Caldwell v. Berlind*, 543 F. App'x 37, 40 (2d Cir. 2013) (rejecting amended claim asserting "an entirely new theory encompassing different conduct"); *Barilli v. Sky Solar Holdings, Ltd.*, 389 F. Supp. 3d 232, 264 (S.D.N.Y. 2019) (allowing such amended claims "would be to undermine [the repose bar's] purpose and abridge Defendants' right to be free from liability after the expiration of three years").

Plaintiff's Chesapeake Claims are barred under that approach. Because those claims differ entirely from the "debt and liquidity" theories in the Original Petition, Plaintiff's Chesapeake Claims expired upon the running of the repose period in January 2018, months before Plaintiff added them in the May 2018 Amended Petition. "Allowing [Plaintiff] to assert [those] claims for liability that no longer exists through an amendment to the pleading would contradict [the

statute of repose's] purpose of freeing defendants absolutely from liability." *First Horizon*, 291 F. Supp. 3d at 372.

The Court should grant mandamus and order the Chesapeake Claims dismissed under the statute of repose.

III. Considered in light of Southwestern's disclosures and the "total mix" of information available, as federal law requires, Southwestern's reserves estimate cannot give rise to liability under the Securities Act.

Even if Plaintiff's Chesapeake Claims were timely, they would fail for lack of materiality. Plaintiff's theory is not that Southwestern's June 2014 reserves estimate was misleading as of the clearly stated date of that estimate, but that it became misleading when oil-and-gas prices later fell and Southwestern allegedly discovered operational risks. Although Southwestern disclosed those developments and their potential impact on reserves, Plaintiff nevertheless insists that Southwestern should have commissioned a new reserves estimate before the January 2015 offering.

Plaintiff's theory violates two blackletter securities-law principles: (1) "[t]he disclosure of accurate historical data does not become misleading even if less favorable results might be predictable by the company in the future," *In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 401 n.3 (6th Cir. 1997), and (2) "dismissal is appropriate where the complaint is premised on the nondisclosure of information that was actually disclosed," *In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358,

377 (E.D.N.Y. 2003) (collecting cases). Those principles are key aspects of the federally mandated, contextual view of materiality that Plaintiff convinced the trial court to ignore.

As an initial matter, Southwestern's reserves estimate reflected that it was made "as of" June 30, 2014 and based on the "historical operating statements of Chesapeake" and the average of oil-and-gas prices from the 12 preceding months, as SEC rules require. R.675, 683-84; *see* 17 C.F.R. § 210.4-10. That makes Southwestern's "as of" estimate akin to cases involving "not a prediction but a statement of historical performance" that was not rendered materially misleading by subsequent changes in commodities prices. *E.g.*, *Kapps*, 379 F.3d at 220-21 (affirming 12(b)(6) dismissal because disclosure of past natural-gas prices was not rendered materially misleading by omission of subsequent decrease in such prices). Only by ignoring the context in which Southwestern's historical estimate appeared could an investor (or trial court) misconstrue it as a guarantee.

Southwestern additionally disclosed "[v]irtually every one of th[e] factors" that Plaintiff claims would have "led to . . . lower estimates of proved reserves" as of the offering date. *Truk Int'l Fund LP v. Wehlmann*, 737 F. Supp. 2d 611, 623 (N.D. Tex. 2009), *aff'd*, 389 F. App'x 354 (5th Cir. 2010) (affirming 12(b)(6) dismissal). It disclosed commodity-price volatility, that those prices had fallen before the offering, and that a prolonged market depression could affect

Southwestern's reserves. R.560-61, 570-71. This information was also publicly available. *Kapps*, 379 F.3d at 216 (finding omitted information regarding natural-gas prices immaterial in part because the "total mix" of information includes the "ready public availability of natural gas prices").

Southwestern also disclosed material operational risks concerning the Chesapeake property and warned that they could affect recoverable reserves. R.561-62, 653. Such robust cautionary language about the "inherently imprecise" nature of reserves estimates renders immaterial any allegedly "misleading" impression created by historical estimates and thereby warrants dismissal at the pleading stage under federal securities law. *Truk*, 737 F. Supp. 2d at 617, 624.

Plaintiff's duty-to-update theory is not merely legally flawed, but impractical as well. Under Plaintiff's view, commodities volatility means that an accurate reserves estimate made one day can become actionably "misleading" the next. *Cf. Cione v. Gorr*, 843 F. Supp. 1199, 1205 (N.D. Ohio 1994) ("Business by its nature is cyclical, and such logic could make any statement of past success actionable subsequent to a company's economic downturn."). Issuers would be forced to continuously recalculate and report reserves. Such "a system of instantaneous disclosure" would be "unworkable and potentially misleading" in the best of circumstances. *In re Turkcell Iletism Hizmetler A.S. Sec. Litig.*, 202 F. Supp. 2d 8, 13 (S.D.N.Y. 2001). But it is even worse for oil-and-gas

companies because a reserves estimate is an intensive undertaking that requires assessment of numerous economic, geological, and technological factors. R.576. This Court should intervene to prevent Texas companies from being placed in that impossible position.

IV. Defendants lack an adequate remedy by appeal.

An improperly denied Rule 91a motion justifies mandamus relief because mandamus is necessary "to spare the parties and the public the time and money spent on fatally flawed proceedings." *See In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding). "Forcing [the] parties to conduct discovery when the claimant's allegations conclusively establish the existence of an affirmative defense would be a significant waste of state and private resources." *Bethel*, 2020 WL 938618, at *3. Indeed, this harm is so great in securities class actions that Congress included in the PSLRA a discovery stay during the motion-to-dismiss process. 15 U.S.C. § 77z-1(b)(1).

PRAYER

Relators request that the Court conditionally issue a writ of mandamus ordering the trial court to vacate its August 14, 2019 order and grant Defendants' motion to dismiss.

Respectfully submitted,

By: */s/ Thomas R. Phillips*

Thomas R. Phillips
State Bar No. 00000022
tom.phillips@bakerbotts.com
BAKER BOTTS L.L.P.
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
Telephone: (512) 322-2565
Facsimile: (512) 322-8363

Aaron M. Streett
State Bar No. 24037561
aaron.streett@bakerbotts.com
J. Mark Little
State Bar No. 24078869
mark.little@bakerbotts.com
Anthony J. Lucisano
State Bar No. 24102118
anthony.lucisano@bakerbotts.com
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
Telephone: (713) 229-1855
Facsimile: (713) 229-7855

Attorneys of Record for Relator/Defendant Southwestern Energy Company

/s/ Noelle M. Reed
Noelle M. Reed
State Bar No. 24044211
noelle.reed@skadden.com
Wallis M. Hampton
State Bar No. 00784199
wallis.hampton@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1000 Louisiana Street, Suite 6800
Houston, Texas 77002

Scott D. Musoff
scott.musoff@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(*motion for admission pro hac vice forthcoming*)

Attorneys of Record for Relators/Defendants Southwestern Energy Company; Stephen L. Mueller; R. Craig Owen; Josh C. Anders; John D. Gass; Catherine A. Kehr; Gregg D. Kerley; Terry L. Rathert; Vello A. Kuuskraa; Kenneth R. Mourton; Elliott Pew; and Alan H. Stevens

/s/ Ellen Sessions
Ellen Sessions
State Bar No. 00796282
ellen.sessions@nortonrosefulbright.com
Rodney Acker
State Bar No. 00830700
rodney.acker@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
2200 Ross Avenue, Suite 3600
Dallas, Texas 75201

Mark Oakes
State Bar No. 24062923
mark.oakes@nortonrosefulbright.com
NORTON ROSE FULBRIGHT US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701

Attorneys of Record for Relators/ Underwriter Defendants

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared, Aaron M. Streett, one of the counsel for Relators in the above cause, known to me to be the person whose name is subscribed to the foregoing instrument, and stated that the factual statements in this petition for a writ of mandamus are supported by competent evidence included in the Relators' Record In Support of Their Petition for Writ of Mandamus.

Aaron M. Streett

Aaron M. Streett

SWORN TO AND SUBSCRIBED before me this 13th day of March 2020.

JANET GUILLORY
6515318
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
AUG 5, 2023

Janet Guillory

NOTARY PUBLIC, STATE OF TEXAS

My Commission Expires:
8-5-2023

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that, according to the word count of the computer program used to prepare this document, the document contains 4,496 words.

/s/ Aaron M. Streett
Aaron M. Streett

CERTIFICATE OF SERVICE

I certify that true and correct copies of this Petition for Writ of Mandamus were served on all parties by the means listed below on the 13th day of March 2020, addressed as follows:

Counsel for Real Party in Interest:

Thomas E. Bilek
tbilek@bileklaw.com
THE BILEK LAW FIRM, L.L.P.
700 Louisiana Street, Suite 3950
Houston, Texas 77002
(*By E-file*)

Beth A. Kaswan
bkaswan@scott-scott.com
Donald A. Broggi
dbroggi@scott-scott.com
Thomas L. Laughlin
tlaughlin@scott-scott.com
Randy L. Moonan
rmoonan@scott-scott.com
SCOTT + SCOTT ATTORNEYS AT LAW LLP
230 Park Avenue, 17th Floor
New York, New York 10169
(*By E-file*)

David R. Scott
david.scott@scott-scott.com
Amanda Lawrence
alawrence@scott-scott.com
SCOTT + SCOTT ATTORNEYS AT LAW LLP
156 South Main Street
P.O. Box 192
Colchester, Connecticut 06415
(*By E-file*)

John T. Jasnoch
jjasnoch@scott-scott.com
SCOTT + SCOTT ATTORNEYS AT LAW LLP
600 West Broadway, Suite 3300
San Diego, California 92101
(*By E-file*)

Respondent:

The Honorable Fredericka Phillips
Harris County Civil Courthouse
201 Caroline St., 9th Floor
Houston, Texas 77002
(*By personal service*)

/s/ Anthony J. Lucisano
Anthony J. Lucisano

APPENDIX

A. Order Denying Defendants' Amended Motion to Dismiss (Aug. 14, 2019)

B. First Court of Appeals' Memorandum Opinion (Feb. 11, 2020)

APPENDIX A

2016-70651

DISMY

ST. LUCIE COUNTY FIRE DISTRICT FIREFIGHTERS' PENSION TRUST, individually and on behalf of all others similarly situated,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	HARRIS COUNTY, TEXAS
vs.	§	
SOUTHWESTERN ENERGY COMPANY et al.,	§	61ST JUDICIAL DISTRICT
Defendants.	§	

ORDER

On this day, the Court considered Defendants' Amended Motion to Dismiss Plaintiff's First Amended Petition Under Rule 91a. The Motion is ~~GRANTED in all respects and Plaintiff's claims are dismissed with prejudice.~~ DENIED. Plaintiff may submit evidence of costs and attorneys fees to be awarded under TRCP 91a and set on the submission docket or for oral hearing.

Signed this _____ day of July 2018.

Signed: 8/14/2019

JUDGE FREDERICKA PHILLIPS

I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.
Witness my official hand and seal of office this September 24, 2019

Certified Document Number: 86762335 Total Pages: 1

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

APPENDIX B

Opinion issued February 11, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00711-CV

IN RE SOUTHWESTERN ENERGY COMPANY, ET AL., Relators

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Relators, Southwestern Energy Company, et al., have filed a petition for a writ of mandamus challenging the trial court's denial of their motion to dismiss the putative class action brought by real party in interest, St. Lucie County Fire District Firefighters' Pension Trust, individually and on behalf of all others similarly situated.[1] We deny the petition. We dismiss all pending motions as moot.

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[1] The underlying case is *St. Lucie County Fire District Firefighters' Pension Trust, individually and on behalf of all others similarly situated v. Southwestern Energy*

PER CURIAM

Panel consists of Justices Keyes, Landau, and Countiss.

Company, et al., cause no. 2016–70651, pending in the 61st District Court of Harris County, Texas, the Honorable Fredericka Phillips presiding.

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Jacqueline Curtis on behalf of Aaron Streett
Bar No. 24037561
jacqueline.curtis@bakerbotts.com
Envelope ID: 41661187
Status as of 03/13/2020 16:08:18 PM -05:00

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Aaron Streett		aaron.streett@bakerbotts.com	3/13/2020 3:47:32 PM	SENT
Mark Little		mark.little@bakerbotts.com	3/13/2020 3:47:32 PM	SENT
Thomas Phillips		tom.phillips@bakerbotts.com	3/13/2020 3:47:32 PM	SENT
Anthony Lucisano		anthony.lucisano@bakerbotts.com	3/13/2020 3:47:32 PM	SENT
Rodney Acker		rodney.acker@nortonrosefullbright.com	3/13/2020 3:47:32 PM	SENT
Thomas E. Bilek	2313525	tbilek@bileklaw.com	3/13/2020 3:47:32 PM	SENT
Beth A.Kaswan		bkaswan@scott-scott.com	3/13/2020 3:47:32 PM	SENT
Donald A.Broggi		dbroggi@scott-scott.com	3/13/2020 3:47:32 PM	SENT
Thomas L.Laughlin		tlaughlin@scott-scott.com	3/13/2020 3:47:32 PM	SENT
Randy L.Moonan		rmoonan@scott-scott.com	3/13/2020 3:47:32 PM	SENT
David R.Scott		david.scott@scott-scott.com	3/13/2020 3:47:32 PM	SENT
Amanda Lawrence		alawrence@scott-scott.com	3/13/2020 3:47:32 PM	SENT
John T.Jasnoch		jjasnoch@scott-scott.com	3/13/2020 3:47:32 PM	SENT