No. 70 180 00648 02

RUSSELL GRIGSBY Claimant, V. PROTRADER GROUP MANAGEMENT, L.L.C., PROTRADER GROUP LIMITED PARTNERSHIP, INSTINET GROUP, INC., DAVID R. BURCH, DAVID G. JAMAIL, ANDREW S. KERSHNER, JOHN A. McENTIRE, OVERUNDER, L.L.C., ZONE TRADING PARTNERS, L.L.C and ZONE EQUITY PARTNERS, L.P. Respondents.	§ § § § § § § § § § § § § § § §	**AMERICAN** **ARBITRATION** **ASSOCIATION**

CLAIMANT'S RESPONSE TO RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT THATGRIGSBY'S 10b-5 CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

INTRODUCTION

Claimant Russell Grigsby respectfully files this Response to the Motion of all Respondents except Instinet Group, Inc. ("Instinet") for Partial Summary Judgment That Grigsby's 10b-5 Claims are Barred by the Statute of Limitations. Respondents have brought this motion although – because it does not affect Grigsby's claims under the Texas Securities Act or the common law of fraud – it has no prospect of altering what Grigsby will prove at trial, the length of the arbitration, or the scope of Grigsby's remedies.

Respondents' motion is based on the fact that Grigsby first asserted claims against them under Section 10b-5 of the Securities and Exchange Act of 1934 more than a year after he learned they had successfully concealed their negotiations to sell their and Grigsby's companies to Instinet. They argue that

the operative statute of limitations is one year, and that the limitations period expired before Grigsby first asserted a claim under Section 10b-5.

The Panel should deny Respondents' motion for two reasons. First, Respondents have entirely ignored the well-known and long-established "relation back" doctrine. Under both Texas and Federal law, Grigsby's addition of 10b-5 claims more than one year after he learned of Respondents' duplicity in concealing the Instinet sale relates back to his original petition filed in Texas State Court, which alleged the same concealment and stated state law securities fraud claims. This petition was filed well within the one-year limitations period Respondents argue applies. Thus, Grigsby's 10b-5 claims relate back to the date of filing of the state court petition and are timely.

Second, Respondents also virtually ignore the fact that Congress lengthened the one-year statute of limitations that formerly governed 10b-5 claims when it enacted the Public Company Accounting Reform and Investor Protection Act of 2002 (hereinafter "Sarbanes-Oxley"). Respondents relegate this point to a footnote and omit mention of the one decision to have ruled on the question. That decision correctly holds that claims, like Grigsby's, brought after the effective date of Sarbanes-Oxley are governed by the new two-year statute of limitations – which makes Grigsby's 10b-5 claims timely. The Panel should hold likewise and deny Respondents' motion.

BACKGROUND

I. Summary of Facts Underlying Grigsby's 10b-5 Claim

Grigsby's claims that Respondents violated Section 10b-5 stems from Respondents' decision to hide their sale negotiations with Instinet from Grigsby

at the same time they were angling to force him out of the company he helped found. *See* Claimant Russell Grigsby's Third Amended Statement of Claim, ¶¶ 32-40. In April 2000, at the same time Respondents were taking steps to oust Grigsby from the ProTrader entities and acquire his interests at a grossly deflated price, they were also negotiating to sell to Instinet – the industry giant of electronic trading. *See id.*, ¶¶ 32-37. Indeed, during that month, Instinet officials came to Austin to "kick the tires" for a sale, as Respondent McEntire has described it. *See id.* at ¶ 35. As Respondents themselves characterized the Instinet negotiations during this period: "There were numerous discussions and communications with Instinet . . . [D]iscussions relating to a potential sale progressed in the Spring 2000 [sic] such that on April 14, 2000, Instinet and ProTrader entered into a confidentiality agreement to govern the sharing of any information incident to discussions relating to a potential acquisition or strategic partnership." Individual Respondents' Response to Claimant's Interrogatory 8, and ProTrader Respondents' Response to Interrogatory No. 9, quoted in *id.*, ¶ 34. Respondents concealed these negotiations and the confidentiality agreement from Grigsby and, on Sunday night, April 30, 2000, pressured him into signing a Letter of Intent ("LOI") promising to convey his stock in the Cornerstone/ProTrader entities to new ProTrader L.P. and L.L.C. entities in exchange for Respondents' agreement to negotiate the redemption of Grigsby's interests in the new entities.

Although Grigsby remained in the dark, sale negotiations between ProTrader and Instinet proceeded through spring and summer 2000. For example, on July 6, 2000, Instinet's Chief of Staff informed Instinet's CEO and

other members of the executive committee that ProTrader's "principals" were "anxious" to sell to Instinet and would take unregistered Instinet stock as consideration. *See id.* at ¶ 38. By early 2001, the Instinet deal was close to completion – yet Grigsby had not been bought out of ProTrader because the Respondents had refused to complete the Redemption and Termination Agreement (RTA") necessary to effectuate the LOI. See id., ¶¶ 38-42. After months of dragging the heels and trying to renegotiate the terms of the Letter of Intent, Respondents suddenly pressed Grigsby to complete the RTA. *See id.*, ¶ 42. On May 10, 2001, that document was finally executed by Grigsby and Respondents, and Respondents acquired Grigsby's interests in the ProTrader entities. *See id.* ***The very next day,*** on May 11, 2001, Instinet and Respondents announced Instinet's acquisition of the ProTrader entities for $150 million and other consideration. *See id.*, ¶ 44. The first Grigsby heard of Instinet's interest in purchasing ProTrader came with this announcement on May 11, 2001.

II. Procedural History of Grigsby's 10b-5 Claim

In light of the facts described above, it is hardly surprising that Grigsby believes Respondents deceived and defrauded him by pressuring him to acquire his ProTrader interests without informing him of the concurrent plan to sell to Instinet. Consequently, Grigsby filed suit in District Court in Travis County on October 2, 2001. *See* Grigsby Original Petition (attached hereto as Exhibit 1, without exhibits). Among his factual allegations were that Respondents had concealed material information – the sale negotiations with Instinet – from him before buying his interests in the ProTrader entities. *See id.* at ¶¶ 25-26. Grigsby further alleged that this concealment violated, *inter alia*, Section 33(B) of the Texas

Securities Act. *See id.*, ¶¶ 35-36. Thus, these factual allegations and legal claims put Respondents on full and complete notice of the Instinet-related fraud Grigsby complains of.

On November 21, 2002, Grigsby filed his Statement of Claim in this arbitration, including the claims for relief under Section 10b-5 Respondents now seek to dismiss. The facts and dealings underpinning Grigsby's 10b-5 claims, outlined above with citations to his Statement of Claim, are precisely the same ones alleged in Grigsby's state court petition, filed on October 2, 2001.[1]

ARGUMENT

I. The Summary Judgment Standard

"A defendant moving for summary judgment on a statute of limitations affirmative defense must prove conclusively that defense's elements." *O'Reilly v. Wiseman*, 107 S.W.3d 699, 702 (Tex. App. – Austin 2003) (citing *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997)); *Pure Distributors, Inc. v. Baker*, 285 F.3d 150, 152-56 (1st Cir. 2002) (same standards obtain under federal law). "When reviewing a traditional motion for summary judgment . . . every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor." *McStay v. Heady Financial Corp.*, __ S.W.2d __, 2003 WL 21710534 (Tex. App.-Eastland, Jul 24, 2003) (citing Tex. R. Civ. P. 166a; *Goswami v. Metropolitan Savings and Loan Association*, 751 S.W.2d 487, 491 (Tex.1988); *Nixon v. Mr. Property Management Company, Inc.*, 690 S.W.2d 546, 548-

[1] The description of Respondents' Instinet-related concealment and fraud cited herein comes from Grigsby's more detailed Third Amended Statement of Claim, not the First Amended Statement of Claim filed on November 21, 2002, which initially asserted the 10b-5 claims. But Respondents do not contend these two statements of claim differ as to the basic factual allegations underlying Grigsby's 10b-5 claim. Grigsby's Third Amended Statement of Claim simply contains more detail, as a result of the ensuing discovery.

49 (Tex.1985); *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 676 (Tex.1979)). In this case, there are no disputed facts at issue; the questions are only the legal ones of whether the relation back doctrine applies, and whether a one or two year statute of limitations governs.

II. Grigsby's 10b-5 Claims are Timely Because They Relate Back to his Timely-filed State Court Petition

As set forth in Point III, Grigsby does not agree that a one-year statute of limitations to his 10b-5 claims. Even if it does, however, Grigsby's claims are timely because they relate back to his state court petition, which was filed within one year of May 11, 2001 – the date Grigsby first learned of ProTrader's Instinet-related double-dealing and the date Respondents concede is the earliest the limitations period could begin to run for purposes of this motion.

Under the Texas Civil Practice & Remedies Code, a pleading tolls the limitation period for claims asserted in a later pleading or amendment as long as the later filing does not allege a new or different transaction:

> If a filed pleading relates to a cause of action . . . that is not subject to a plea of limitations when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

TEX. CIV. PRAC. & REM. CODE § 16.068. Thus, for limitations purposes, the later pleading or amendment "relates back" to – and is considered as having been filed at the time of – the initial pleading. *See, e.g., Stevenson v. Koutzarov*, 795 S.W.2d 313, 319 (Tex. App. – Houston [1st Dist.] 1990, writ den.); *Meisler v. Republic of Texas Sav. Ass'n*, 758 S.W.2d 878, 881-882 (Tex. App. – Houston [14th Dist.] 1988, no writ).

When applying Section 16.068, the test is whether the claim asserted in the later or amended pleading grows out of the previously alleged transaction or occurrence. *See, e.g., Ex parte Goad*, 690 S.W.2d 894, 896 (Tex. 1985); *Leonard v. Texaco, Inc.*, 422 S.W.2d 160, 163 (Tex. 1967). As the Texas Supreme Court emphasized in *Goad*: "If the amended motion does not allege a *wholly* new, distinct or different transaction, then it relates back to the original filing and is not subject to a limitations defense." 690 S.W.2d at 896 (emphasis in original). Finding there that the plaintiff's "basic complaint is still the same" as that asserted in the timely-filed pleading, the Supreme Court rejected defendant's argument. Likewise, in *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89 (Tex. App. – El Paso 1997 pet. denied), the Court of Appeals rejected a limitations defense by broadly construing the term "transaction" in Section 16.068 to mean "that set of facts which gives rise to the cause of action . . . in other words . . . the totality of events which entitle a plaintiff to bring suit." *Id.* at 121; *accord Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990) (plaintiff's fraud claims held timely, though filed six years after the alleged fraud, because they related back to earlier, timely-filed breach of contract claims arising out of the same occurrences).

The federal law of "relation back" is essentially identical to Section 16.068. Fed. R. Civ. P. 15(c) provides that an amended pleading relates back to the date of the filing of the original pleading when "the claim or defense asserted in the amended pleading arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Factors federal courts consider in determining whether a claim "arose out of the same conduct, transaction, or occurrence" include: "(1) whether the defendant had notice of the claim that the plaintiff is now asserting, (2) whether the plaintiff will rely on the

same kind of evidence offered in support of the original claim to prove the new claim, (3) whether unfair surprise to the defendant would result if the court allowed the amendment to relate back." 3 James W. Moore, *et al.*, MOORE'S FEDERAL PRACTICE § 15.19[2].

The rationale underlying the "relation back" rule is entirely sensible, as well as applicable here: it prevents a party from claiming unfairness or surprise when the facts at issue gave rise to related claims asserted earlier. Once a defendant knows of litigation involving a particular set of transactions or occurrences, he/she has received all the notice and protection the statute of limitations requires. *See FDIC v. Conner*, 20 F.3d 1376, 1386 (5th Cir. 1994) (damage caused by loans arose out of same conduct as identified in complaint and defendant may not rely on statute of limitations to protect against addition of related claims).

In this case, there can be no real doubt that Grigsby's 10b-5 claims relate back to his original state court petition, which was filed within the one-year limitations period Respondents argue governs. That petition sets forth the "set of facts which gives rise" to Grigsby's 10b-5 claim, *Hill* 964 S.W.2d at 121: that Respondents pressured Grigsby to sell out without disclosing Instinet's interest in buying the companies and the sale negotiations. As the State Court petition alleged:

> 24. However, none of the Defendants ever disclosed any pending negotiations with Instinet. Completely without knowledge of these negotiations, Mr. Grigsby signed the Redemption and Termination Agreement ("Redemption Agreement") on May 10, 2001 . . . The following day, on May 11, 2001, ProTrader announced that Instinet Group, Inc. ("Instinet") would acquire ProTrader LP for $150 million. Mr. Grigsby only subsequently, and for the first time,

> learned of the planned transaction from friends who forwarded to him news releases of the deal on May 11, 2001.
>
> 25. Obviously the ProTrader LP partners, to the exclusion of Mr. Grigsby, had been negotiating the sale of ProTrader LP to Instinet for some period of time prior to the announcement of the acquisition on May 11, 2001. Such negotiations or any information about a possible sale of ProTrader LP were never disclosed to Mr. Grigsby. Additionally, the valuation of ProTrader LP under the Instinet sale constitutes a valuation that is 4.3 times higher than the valuation used in the Redemption and LOI.

Grigsby Original Petition, Exhibit 1. Likewise, in stating his claims under the Texas Securities Act, Grigsby pled:

> 36. Defendants Jamail, Burch, Kershner and McEntire, in order to induce Mr. Grigsby to sign the Redemption Agreement and to accept a much lower valuation of ProTrader LP, each deliberately failed to disclose material information regarding negotiations for the sale of ProTrader LP to Instinet and the consequent valuation of ProTrader. Their material omissions and failure to disclose constitute violations of the Texas Securities Act, section 33(B) and entitle Mr. Grigsby to rescission of the Redemption Agreement and to damages incurred.

Id. These are plainly the same factual allegations as those underlying the 10b-5 claim Respondents now seek to dismiss.

Indeed, in their motion, Respondents essentially concede that Grigsby's state court petition made this same "basic complaint." *Goad*, 690 S.W.2d at 896. In describing the state court petition, Respondents write: "Six months after notice [on May 11, 2001, when Grigsby learned of the sale to Instinet], he filed a lawsuit *asserting state securities fraud based on the failure to disclose Instinet.*" Motion at 6 (emphasis added). The fact that Grigsby later added federal securities fraud claims based on the same transactions does not make those claims untimely.

Rather, under Section 16.068 and Rule 15(c), the 10b-5 claims simply relate back to the earlier-filed, timely state court petition. Having been put on notice of Grigsby's fundamental complaint about Respondents' hiding the Instinet negotiations at the same time they were buying his interests, Respondents cannot persuasively claim that Grigsby's 10b-5 claims are somehow stale or surprising, or that there is any unfairness in having to answer it along with the earlier-filed, parallel state securities fraud claim. And, obviously, Grigsby will "rely on the same kind of evidence" to prove both the timely-filed Texas Securities Act claim as the later-filed federal claims. 3 MOORE'S FEDERAL PRACTICE § 15.19[2]. This case presents a paradigmatic example of the proper application of the "relation back" doctrine.

In sum, Grigsby filed his state court petition within one year of when Respondents concede, at least for purposes of their motion, he learned of the Instinet sale. While that petition did not include the 10b-5 claims, it did assert state securities fraud claims based on exactly the same factual allegations as underpin the subsequent 10b-5 claims, as Respondents acknowledge. Thus, Grigsby's 10b-5 claims relate back to this earlier-filed pleading and are timely.

II. Grigsby's 10b-5 Claims Are Timely Under The New Two-Year Statute of Limitations, Which Applies Here

Respondents are incorrect, in any event, that the statute of limitations applicable to Grigsby's 10b-5 claims is one year. In fact, Congress changed the statute of limitations to two years when it enacted Sarbanes-Oxley. Under that statute's new, applicable two-year statute of limitations, Grigsby's 10b-5 claims are timely even without relation back to his state court petition.

Congress enacted Sarbanes-Oxley on July 26, 2002, and President Bush signed it into law on July 30, 2002. *See* Pub. L. No. 107-204. Sarbanes-Oxley changed the former one-year statute of limitations applicable to 10b-5 claims by adding the following new language:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of-
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Pub. L. 107-204, Title VIII, § 804(a). Sarbanes-Oxley further provided that the new, two-year limitations period "shall apply to all proceedings addressed by this section that are commenced on or after the date of enactment of this Act." *Id.*, § 804(b). In other words, in Sarbanes-Oxley, Congress adopted a two-year statute of limitations and made it applicable to "all proceedings . . . commenced on or after the date of enactment of this Act," which is July 30, 2002.

There is no question that Grigsby brought his 10b-5 claims: (i) after July 30, 2002, and (ii) less than two years after the date Respondents concede Grigsby learned of the Instinet concealment (May 11, 2001). Thus, by the plain terms of Sarbanes-Oxley, the new, two-year statute of limitations governs this case and Grigsby's 10b-5 claims are timely. Despite the clear language of Sarbanes-Oxley, however, Respondents contend that the new law did not become effective until Grigsby's 10b-5 claims were already barred under the old statute of limitations, and that Sarbanes–Oxley does not evince a Congressional intent to revive time-barred claims. *See* Motion at 7 n.1. This argument is without merit.

Congress can extend a "previously applicable limitation period that ha[s] already commenced running and . . . enact a new limitation rule so as to revive claims already barred under a prior rule." *United States v. Hunter*, 700 F. Supp. 26, 27 (M.D.Fla.1988) (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 311-12 (1945)). That is exactly what Congress has done in Sarbanes-Oxley. The only court to have considered this question has held that Sarbanes–Oxley applies to all claims brought after July 30, 2002, even if they were already untimely as of that date. *See Roberts v. Dean Witter Reynolds, Inc.*, __ F. Supp. __, 2003 WL 1936116 (M.D. Fla., March 31, 2003) (attached hereto as Exhibit 2). In *Roberts*, the plaintiffs complained of conduct that occurred outside of the former statute of limitations, and defendants made the same arguments as Respondents, citing the same Fifth Circuit decision, *Resolution Trust Corp. v. Seale*, 13 F.3d 850 (5th Cir. 1994). *See id.* at * 2.

Nonetheless, the *Roberts* court concluded that Sarbanes-Oxley revived plaintiffs' otherwise untimely claims:

> The plain language of the amendment provides that the extended limitations period "shall apply to all proceedings addressed by this Section that are commenced on or after the enactment of this Act." The effective date, which is July 30, 2002, hinges on the date that "proceedings" commence or commenced rather than on the date the violation occurred. *This language, standing alone, seems to presume that the Act affords redress for violations that had already occurred before July 30, 2002.*

Id. *2 (emphasis added) (statutory citations omitted). Because Sarbanes-Oxley makes no specific mention of retroactive application, the court also looked to the new statute's legislative history, which, it concluded, supports the view that the lengthened statute of limitations applies to claims barred at the time of enactment:

As a whole, the history reveals that Congress intended to lengthen the statute of limitations to enable people who lost their life-savings to companies like Enron to recover some of their investments. To do so, the amendment must be given retroactive application.

Evidence of the intent of Congress may be discerned from the words of Senator Leahy of Vermont on July 10, 2002, when he stated the following:

> When I look at places such as Washington State alone where the pension funds of firefighters and police lost $50 million because of the fraud of the leaders of Enron, I don't feel too sympathetic. We already have a very short statute of limitations in here anyway. *We ought to at least have that so people might be able to recover some of the money they have lost,* if it is at all possible, instead of just a few executives going up and building their $50 million mansions and hiding it there. There ought to be some way for the people who lost their pensions, lost their life savings, to get it back . . .
>
> Florida lost $335 million because of Enron; the University of California, $144 million-all the way down to Vermont; we lost millions of dollars. *These are people who would like, in these kinds of cases, at least to have a statute of limitations such that we can go after them.*
>
> I am here to try to protect people and give them an opportunity-when there has been such enormous fraud and all the pension funds have been lost, and all the people who have lost their life-savings ---- *give them at least some chance to recover something, especially as the executives of these companies walk off with tens of millions of dollars.* We go two-five instead of one-three. That was negotiated and voted on in the Judiciary Committee, and the final bill was passed unanimously.

148 Cong. Rec. S6524-02, * S6534-35 (emphasis added). The language referring to victims of Enron recovering damages indicates the intent to retroactively apply the statute of limitations.

Id. *3.

The *Roberts* court also noted the section-by-section analysis of Title VIII of Sarbanes-Oxley, which was made a part of the record "in order to provide

guidance in [its] legal interpretation." 148 Cong. Rec. S7418-01, * S7418. The section-by-section analysis provides:

> This provision . . . states that it is not meant to create any new private cause of action, but only to govern all the already existing private causes of action under the various federal securities laws that have been held to support private causes of action. This provision is intended to lengthen any statute of limitations under federal securities law, and to shorten none. The section, by its plain terms, applies to any and all cases filed after the effective date of the Act, regardless of when the underlying conduct occurred.

Id. As the *Roberts* Court correctly acknowledged, "[t]he phrase 'regardless of when the underlying conduct occurred' demonstrates that Congress intended for the extended statute of limitations to apply retroactively." *Roberts*, 2003 WL 1936116 at *4.

In addition to *Roberts*, at least one commentator has also concluded that the new statute of limitations in Sarbanes-Oxley governs claims that would be untimely on July 30, 2002:

> This provision is applicable to all proceedings commenced after the enactment date of the Act. This has retroactive applications, at least for a period of time, in that actions filed after the date of the Act it permits an action to be brought within a period of time that at the date of the Act would have been barred under the statute of limitations as it existed prior to the adoption of the Act. Senator Leahy, who sponsored Title VIII in the Senate, left no doubt in that and other regards by creating legislative history through extended remarks as of the day the Act was passed by the House and the Senate.

Harold S. Bloomenthal, *Sarbanes-Oxley in Perspective*, SEC-SOAP § 74 at 2, September 2002 (attached hereto as Exhibit 3).

Because of the "relation back" doctrine discussed above, Respondents are incorrect that Grigsby's 10b-5 claims are untimely under the old, one-year statute of limitations. But even if Grigsby's claims did not relate back to an earlier and

timely pleading, Respondents' motion would fail because Sarbanes-Oxley has extended the applicable statute of limitations. The Panel should adhere to the plain language of the new law, as well as the only decision construing it, and hold that Grigsby's 10b-5 claims are timely because they was filed after July 30, 2002 and were brought within two years of Grigsby's discovery of Respondents' double dealing with regard to Instinet.[2]

CONCLUSION

For the foregoing reasons, Claimant Russell Grigsby respectfully requests that the Panel deny Respondents' Motion for Partial Summary Judgment That Grigsby's 10b-5 Claims are Barred by the Statute of Limitations.

Respectfully submitted,

WATTS LAW FIRM, LLP

By:_____

Martin Siegel
Texas Bar No. 18342125
Watts Law Firm, LLP
815 Walker Street, 16th Floor
Houston, TX 77002
(713) 225-0500
Fax: (713) 225-0566

[2] As Respondents acknowledge, the timeliness of Grigsby's 10b-5 claim ensures the timeliness of his claim under Section 20(a) of the 1934 Act that Respondents are liable as controlling persons. *See* Motion at 7-8.

JACKSON WALKER L.L.P.

100 Congress, Suite 1100
Austin, TX 78701
(512) 236-2000
(512) 236-2002 - Fax

By: _____
Ben C. Broocks
State Bar No. 03058800

ATTORNEYS FOR CLAIMANT
RUSSELL GRIGSBY

MARTIN J. SIEGEL

BIOGRAPHY

Martin J. Siegel was born and raised in Houston. He earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, where he majored in the Plan II Liberal Arts Honors Program and graduated *Phi Beta Kappa.*

Siegel received his law degree, *Cum Laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, DC office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property, and environmental matters. He assisted in the Supreme Court briefing for respondents in *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439 (1993); represented MCI in patent, antitrust and other matters; and helped develop the evidence for, draft and present a petition for post-conviction relief to the Maryland state trial court on behalf of death row inmate Kevin Wiggins. Although the court denied the petition, the U.S. Supreme Court eventually granted it in a decision vacating the death sentence and setting new standards for counsel in the sentencing phase of capital cases. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Civil rights cases brought by Siegel include a complaint under the Voting Rights Act following fraud in a Bronx school board vote, resulting in a new election; some of the first cases in the United States brought under the Freedom of Access to Clinic Entrances Act; an action based on discriminatory zoning in violation of the Americans with Disabilities Act; and an investigation of the New York City Parks Department for employment discrimination. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws (invalidating local rules against disclosing the immigration status of aliens to federal law enforcement) from constitutional attack under the 10th Amendment brought by New York City. *See City of New York and Rudolph Giuliani v. United States and Janet Reno,* 179 F.3d 29 (2d Cir. 1999).

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

In all, Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an Assistant United States Attorney in 1999 for the successful trial defense of the former chief of the CIA's Technical Services Division in a case involving the agency's experimentation with LSD in the early 1950s.

In 2000-01, Siegel was detailed to serve as Special Counsel on the minority staff of the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, the McCain-Feingold campaign finance bill, criminal justice, immigration and other issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, patent, trade secret, false advertising, product liability and personal injury litigation. In 2002, he successfully represented Texas beer distributors against Anheuser-Busch after it wrongfully prevented a $60 million sale of their distributorship, achieving a highly favorable confidential settlement. In 2003, he helped represent the founder of a securities trading firm forced out of the business he founded before its sale for $150 million, winning a $43 million arbitral award. In 2005, he successfully represented Stabar Enterprises, a small Austin pet products company, in multiple lawsuits arising from a licensing dispute with one of the country's largest makers of animal products, securing the dismissal of a related suit against Stabar and a favorable confidential settlement that included the sale of the company's assets.

In 2006, Siegel successfully represented the Texas Democratic Party in its suit to prevent the Republican Party of Texas from replacing Tom DeLay on the general election ballot for Congress following DeLay's withdrawal as a candidate. Siegel wrote the Democratic Party's briefs in the Fifth Circuit on an expedited schedule and co-argued the appeal, resulting in a complete victory for TDP's position under the Constitution's Qualifications Clause and state election law and an order barring the replacement.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. He remains of counsel to Watts Law Firm.

In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

Siegel has written frequently on legal topics. In 2007, he was named to the Board of editors of Litigation, the magazine published by the ABA's Section on Litigation. Siegel's writings include:

- *Zealous Advocacy vs. Truth*, 33 LITIGATION 31 (Fall 2006);
- *The Myth of Dem, GOP Justice*, HOUSTON CHRONICLE, September 10, 2006, at E4;
- *We Don't Have Kings in Texas*, HOUSTON CHRONICLE, May 29, 2005, at E4;
- *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VERMONT L. REV. 373 (Winter 2004);
- *Bryant Case Tosses a Lifeline to the Laws Against Adultery*, LOS ANGELES TIMES, August 13, 2004, at B13;
- *Why Texas Republicans Should Love the Trial Lawyers*, HOUSTON CHRONICLE, April 20, 2003, at 4C; and
- *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAMILY L. 45 (1991-92).

Siegel has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and at business and graduate school classes at Princeton and UCLA, and as a speaker at CLE seminars and workshops in Houston and elsewhere.

APPELLATE AND BRIEF WRITING EXPERIENCE

Martin Siegel has an extensive background in appellate and trial-level briefing and argument cutting across a broad range of substantive and procedural areas, including constitutional law, commercial disputes, product liability, personal injury, federal preemption, consumer protection, jurisdiction, removal and remand, governmental immunities, employment law and others.

Siegel's experience began as a federal appellate law clerk and deepened over years of representation of corporate defendants, the United States and individual plaintiffs. He has briefed and argued appeals in the United States Courts of Appeals for the Second Circuit and Fifth Circuit, the Texas Supreme Court (briefed only), and several state appellate courts, and has assisted with briefs written for the United States Supreme Court.

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

Some of Siegel's more significant cases include:

- *Texas Democratic Party v. Tina Benkiser, Chairwoman of the Republican Party of Texas.* The Texas Democratic Party sued the Republican Party of Texas to prevent it from substituting a new Congressional candidate for Tom DeLay after his withdrawal from the 2006 election. TDP argued that it was too late to substitute candidates, while RPT claimed replacement was permitted because DeLay had moved to Virginia and was therefore constitutionally ineligible to serve. Siegel handled most of the briefing in the district court, wrote the briefs for TDP in the Fifth Circuit on an expedited schedule and shared oral argument with the party's full-time counsel, obtaining a complete vindication of TDP's position that it had standing to bring the case and that DeLay's replacement would violate the Constitution's Qualifications Clause and state election law. *See* 459 F.3d 582 (5th Cir. 2006).

- *City of New York and Rudolph Giuliani v. United States and Janet Reno.* New York City challenged provisions of the 1996 welfare and immigration reform laws that invalidated local rules against disclosing the immigration status of aliens to federal law enforcement. In a case of first impression, the Second Circuit held that the federal provisions do not violate the Tenth Amendment's bars on interfering with state operations or conscripting state officials to carry out federal tasks. *See* 179 F.3d 29 (2d Cir. 1999). Siegel wrote the federal government's trial and appellate briefs and successfully argued the appeal in the Second Circuit.

- *Grigsby v. ProTrader Group Management LLC, et al.* In this arbitration, Grigsby claimed that the defendants violated securities laws and committed minority shareholder oppression by squeezing him out of the company he co-founded shortly before it was sold for $150 million. As part of the team representing Grigsby, Siegel briefed and argued summary judgment motions and other issues, including ratification, duties owed under the Texas Revised Partnership Act, the statute of limitations for 10b-5 claims under Sarbanes-Oxley, standards for recovery for shareholder oppression, and others. The arbitrators accepted Grigsby's legal positions and awarded him $43 million in compensation. Case No. AAA 70 180 00648 02.

- *Barahona v. Toyota Motor Corp., et al.* The plaintiff sued Toyota when his son was rendered a quadriplegic, alleging that the defective design of the Toyota

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Echo's seatback caused the injuries. Toyota twice filed writs of mandamus in the Court of Appeals and once in the Texas Supreme Court attacking various discovery and other rulings. Siegel wrote the plaintiff's responses, obtaining denials of Toyota's petitions. *See* 191 S.W. 3d 498 (Tex. App. – Waco 2006, mandamus denied, Case No. 06-0449, TX Sup. Ct., June 5, 2006). Siegel also briefed several *Daubert,* summary judgment and other motions, resulting in rulings favorable to the plaintiff.

- *Ayala v. Ford Motor Co.* In this wrongful death case, Ford argued that it complied with applicable federal safety standards and was therefore not liable under TEX. CIV. PRAC. & REM. CODE § 82.008(a). When the plaintiffs responded that Ford's inadequate disclosures to NHTSA rebutted the presumption of nonliability under § 82.008(b)(2), Ford replied that subsection (b)(2) is impliedly preempted under the reasoning in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a position the Sixth Circuit and other courts have adopted. Siegel handled the plaintiffs' briefing, and the district court agreed with the plaintiffs that federal law does not conflict with § 82.008(b)(2) and that *Buckman* preemption applies only to fraud-on-the-agency theories of liability, not traditional state product liability claims. Case No. 2-04CV-395 (E.D. Tex. 2005).

- *Rivera v. Heyman, Secretary, Smithsonian Institution, et al.* Siegel represented the Smithsonian in this employment discrimination case raising the novel question whether the Smithsonian, a unique and independent federal trust instrumentality dating to 1836, is subject to § 501 of the Rehabilitation Act, which covers only executive branch employees. Following Siegel's briefing and argument, the district court agreed with the government that the Smithsonian is not in the executive branch and therefore not subject to § 501. As a result of the case, Congress amended the Act to include the Smithsonian. On appeal, which Siegel also briefed and argued, the Second Circuit upheld the remainder of the district court's decision holding that the plaintiff had no additional remedy under § 504 of the Act – a question on which several circuit courts had split – or state and local civil rights laws. *See* 157 F.3d 101 (2d Cir. 1998).

- *Good Samaritan Hospital Regional Medical Center, et al. v. Shalala.* Three hospitals and Medicare providers sued HHS seeking to compel review of a decision not to reopen the hospitals' claims for reimbursement of various significant expenses. Siding with the government after Siegel's briefing and argument, the Second Circuit held that jurisdiction to undertake the requested review was lacking, and that challenged HHS regulations were permissible in

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light of the Medicare Act. The Second Circuit reached this conclusion despite Ninth Circuit precedent to the contrary. *See* 85 F.3d 1057 (1996).

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